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STREET RAILWAY LAW

VOL. IV

A COMPREHENSIVE WORKING COMPENDIUM,

OF

IMPORTANT STREET RAILWAY DECISIONS IN ALL PARTS OF THE COUNTRY, COVERING PRACTICALLY ALL NEW LEGAL QUESTIONS, INCLUDING PROMOTION, CHARTER, CONSTRUCTION, EQUIPMENT AND MAINTENANCE PROBLEMS, GENERAL RELATIONS TO THE PUBLIC AND TO OTHER ROADS, RIGHTS AND DUTIES AS TO PASSENGERS AND EMPLOYES, WITH MANY OTHER POINTS BROUGHT OUT IN THE LARGE NUMBER OF CONTROVERSIES WHICH DAILY ARISE IN THE OPERATION OF STREET RAILWAYS

FOR

MANAGERS

AND

OPERATING, LEGAL AND CLAIM DEPARTMENTS

COMPILED FOR THE STREET RAILWAY REVIEW

BY

J. L. ROSENBERGER, A. M., LL. B.,

OF THE CHICAGO BAR.

CHICAGO
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PREFACE.

In presenting this, the fourth volume of STREET RAILWAY LAW, it appears scarcely necessary to make extended mention of the litigation concerning street railways and the need for managers, as well as claim agents and attorneys, to be informed as to the decisions of the courts.

This book tells what the courts have decided, the matter being couched in language that will be understood by the layman as well as the lawyer. To quote from the preface to Volume III: In its preparation, the constant aim has been to omit nothing vital, to cover all points of interest of both law and fact; to give as much space as necessary to new and exceptionally important points, yet, on the whole, to be as brief as possible without sacrificing anything of practical value. It is much more full and comprehensive than an ordinary digest would be, and is at the same time in about the same proportion less bulky and more readable than would be the several volumes that would be required to report the same cases in full. It is probably all that managers or other street railway officers will care for in the way of reports on the cases covered, while such attorneys as desire to see and use full opinions, when the occasion requires, will find it a good medium for locating such as they want, as well as a convenient handbook for many other purposes.

The arrangement chronologically and something of the style are attributable to the fact that the work was originally prepared for publication in the Legal Department of the "Street Railway Review." However, it is believed that there will be more gain than loss in this last fact. The index, which has been prepared with a good deal of care, will make the contents of the book readily available.

May, 1903.

STREET RAILWAY LAW.

TURNING OF BICYCLIST ONTO TRACK WITHOUT NOTICING CAR.

Medcalf v. St. Paul City Railway Co. (Minn.), 84 . W. Rep. 633. Dec. 17, 1900.

For a bicyclist riding 40 or 50 feet behind a street car that suddenly slows down on account of a wagon ahead of it to attempt to pass the car by turning onto the adjoining track, without noticing a car approaching on that track, which, by the exercise of the most ordinary care and prudence, he could not fail to see, and with which he collides, the supreme court of Minnesota holds is such contributory negligence as to warrant the direction of a verdict for the company, notwithstanding negligence in the speed of the car.

WHERE CHILD RUNS IN FRONT OF APPROACHING CAR.

Campbell v. New Orleans City Railroad Co. (La.), 28 So. Rep. 985. June 4, 1900. Rehearing denied Nov. 19, 1900.

The supreme court of Louisiana holds that if an accident happens to a child by its running upon a track in front of an approaching electric car, no liability attaches to the motorman or his employer if the circumstances were such as were not calculated to cause the motoneer, in the exercise of proper prudence and caution, to suspect that it would do so, and he takes immediate action to save the situation the moment its intended course is shown.

DUTY OF DRIVER ON TRACKS TO TRY TO PREVENT COLLISION.

McCann v. New York & Queens County Railway Co. (N. Y. Sup.), 67 N. Y. Supp. 748. Dec. 31, 1900.

To instruct a jury that a driver of a carriage, whose back was to an approaching car, was under no legal obligation to look around to see if it was coming, the first appellate division of the supreme court of New York holds was reversible error, it being his duty, while driving upon street railway tracks, if he knew that a car was approaching, and was liable to or was about to collide with the carriage which he was driving, to do whatever he could to prevent that collision, and if he did not do that, and by reason thereof he sustained an injury, the street railway company could not be held liable for it.

$1,054 FOR GUARD BAR FALLING ON MAN'S HEAD.

Smith v. Nassau Electric Railroad Co. (N. Y. Sup.), 67 N. Y. Supp. 1044. Jan. 11, 1901.

A guard bar of wood, four inches wide, an inch thick, and about sixteen feet long, fell upon the head of the plaintiff as he was boarding an open car. He became senseless and ill, and suffered great pain and dizziness, attended with nausea and vomiting. Throughout the summer he suffered from pain in the head, and could not go out in the sun except with the penalty of violent pain and dizziness. He was a farmer, and was forced to carry a sunshade into the fields when he superintended his men, and could not work himself. The following sumer he suffered like pain and discomfort and inability, but in a lesser degree, he testified. Others testified that his mental processes were not as quick and active as they were previous to the accident. Under these circumstances the second appellate division of the supreme court of New York holds that a verdict in his favor for $1,054 was not excessive.

SNOW BLOCKADES EXCUSE FAILURE TO RUN CARS WITH AGREED FREQUENCY.

Buffalo & Lancaster Land Co. v. Bellevue Land & Improvement Co. (N. Y.), 59 N. E. Rep. 5. Jan. 8, 1901.

A contract to construct an electric street railroad and run passenger cars thereon as often as once every half hour from 7 a. m. to 8 p. m. each day, as such street railroads are usually run, the court of appeals of New York holds, fairly construed, does not absolutely bind the company making the contract to run a car every half hour each day under all circumstances and conditions, whether possible or not. Nor does it consider that there is a substantial breach of the contract where, say during a considerable part of the time between Dec. 1 and April 1, heavy snowfalls and drifted snow render it practically impossible to run cars over the road every half hour, but the snow is removed with the appliances and assistance usually and ordinarily employed for that purpose by street railroads, and, when so removed, the cars are run with the agreed frequency.

PARENT'S NEGLIGENCE—MOTORMAN'S EXCITEMENT —ADOPTION OF APPLIANCES.

Warren v. Manchester Street Railway (N. H.), 47 Atl. 735. July 27, 1900.

A parent's negligence, the supreme court of New Hampshire holds, is not imputable to his child.

A motorman's excitement, which causes him to err in judgment in his efforts to stop his car to avoid an accident, as for example causes him to use the brake when he ought to use the reverse, the court holds, will not alone excuse him from the charge of negligence, but is one of the circumstances to be considered by the jury in determining whether he was guilty of negligence or not.

Again, the court holds that a street railway company's duty to equip its cars with safety appliances is not limited by their convenience, but includes the adoption of such appliances as men of average prudence would use under the same circumstances.

DUTY AT CURVE TO PASSENGER ON PLATFORM—CONDUCTOR'S TIME CARD NOT ADMISSIBLE.

Lucas v. Metropolitan Street Railway Co. (N. Y. Sup.), 67 N. Y. Supp. 833. Dec. 31, 1900.

The defendant, having permitted the plaintiff to go upon its car and taken his fare, the first appellate division of the supreme court of New York holds, obligated itself to exercise extraordinary care to transport him to the point of his destination without injury. It could not expose him to unreasonable danger, even though he stood upon the platform of the car. When it was about to run its car around a curve at such a rate of speed as would be sufficient to wrench his hands from the hand rail of which he had hold, and throw him to the street, it owed him the duty of informing him of that fact, or indicating to him in some way that he must exercise at that point increased care for his own safety. Failure to perform this duty, the passenger being free from negligence, the court holds, rendered the company liable for damages for his injury.

Refusal of the trial court to admit the time card of the conductor of the car, showing the exact time when the accident occurred, it is held, was not error, the appellate division being of the opinion that the time card was properly excluded. It says that it was, at most, a memorandum made by the conductor, a servant of the defendant, of which the plaintiff had no knowledge, and which could not possibly bind him in any way. It might be referred to by the conductor for the purpose of refreshing his recollection, but it could not be introduced in evidence for the purpose of corroborating the testimony of the conductor or to establish the fact as to the time when the accident did actually occur.

INSTRUCTION TO JURY ABOUT TESTIMONY AS TO PAYMENT OF FARE.

Reem v. St. Paul City Railway Co. (Minn.), 84 N. W. Rep. 652. Dec. 21, 1900.

This was a personal injury case which involved the question of whether the plaintiff had paid his fare and was a passenger upon the defendant's car. At the trial the court instructed the jury: "Now, gentlemen, it is proper for you to consider all the testimony bearing upon the question as to whether this plaintiff paid his fare or not. Of course, it matters not whether he paid his fare with a nickel or with pennies, or in any other way. If in fact he did pay his fare, then he became a passenger upon the car. But, of course, it is proper for you to carefully remember the proof he offers in regard to the payment of the fare, and what other witnesses have testified in regard to the payment of the fare; for, even while he may be mistaken in regard to the manner in which he paid his fare, still if in fact he did pay his fare he thereby became a passenger. But if he was mistaken—has given incorrect testimony in your presence—in regard to the manner of paying his fare, that is proper for you to consider upon the credibility which is to be given to his testimony and the testimony of the other witnesses in this regard." This, the supreme court of Minnesota holds, was a correct statement of the law.

SECOND CONSOLIDATION VALID AND CARRIED POWER TO EXTEND TRACKS.

In re Trenton Street Railway Co. (N. J. Ch.), 47 Atl. Rep. 819. Dec. 20, 1900.

The court of chancery of New Jersey holds that where, by a consolidation of several roads, a corporation de facto or in fact was formed, and this latter formed a part of a second consolidation with still other roads, the second consolidation agreement would be valid notwithstanding one of the roads in the first consolidation might have been incapable of consolidating with another street railway, and that the corporation formed by the second consolidation would have the power of each of the constituent members of both consolidations, including the power to extend tracks.

The act of 1891, which put all street railroads within the class of roads included within the general act of 1888 which authorized the consolidation of horse roads, the court holds was a perfect act, and that the reference to the provisions of the act of 1888 was sufficient, without a re-enactment of nearly the whole body of that statute.

LIABILITY FOR INJURY OF PASSENGER ATTEMPTING TO LEAVE CAR AFTER COLLISION.

Wanzer v. Chippewa Valley Electric Railroad Co. (Wis.), 84 N. W. Rep. 423. Dec. 7, 1900.

This was an action to recover damages for personal injuries sustained by a passenger for hire on an electric car, by reason of its running into a load of hay at 10 minutes after 8 o'clock on a June evening. One of the questions submitted to the jury elicited the answer that a prudent person engaged in the business of the company, who exercised the utmost care and forethought for the safety of passengers, would not have foreseen, in the light of the attending circumstances, that an injury to the plaintiff would be the natural and probable result of operating the car as it was operated. Now, the supreme court of Wisconsin holds that this answer, upon which the company relied, presented an insurmountable objection to holding that the judgment which was rendered for the company was supported by the findings of the jury, because the answer did not embody the standard of care required of the company. There were, it says, several persons in the car besides the plaintiff. The company owed the same duty of care and forethought for the safety of all of them. If by the exercise of such care and forethought its employes, or any of them, in charge of the car, would have foreseen, in the light of the attending circumstances, that an injury to any of such passengers would be the natural and probable result of operating the car as it was operated, and failed to do what they could to prevent such injury, then the company would be guilty of actionable negligence, whereas the question submitted and answered limited the company's care and forethought to the plaintiff alone. Furthermore, the court holds that the darkness of the night, caused by the coming of a storm and the trees along the street, and the liability of teams to be upon the track, made it a proper question for the jury to determine whether, under the circumstances, the speed of the car was negligently high. The court assumes that the reversal of the car and the consequent blowing out of the circuit breaker, was not of itself actionable negligence. But the flash, explosion, and collision it thinks were well calculated to shock a nervous person of a class such as are liable and expected to ride upon street cars, as well as to travel upon the public highways. And it holds that this passenger would not be precluded from a recovery by the mere fact that she unwisely attempted to escape from the car, after the collision, instead of remaining quietly in the car. However, to say that the company was required to exercise "the utmost care and forethought for the safety of passengers," and the like, the court holds misleading, if not erroneous.

GOING NEAR TRACK TO UNLOAD WAGON WITHOUT WATCHING FOR CARS.

Davies v. People's Railway Co. (Mo.), 59 S. W. Rep. 982. Dec. 11, 1900.

At a point where building materials had been deposited on the street leaving just enough space between them and a street car track for the unloading of wagons, a man who had gone very close to the track while assisting in unloading heavy iron beams from a wagon was struck by a car. His averment was that he was struck by the car wholly and entirely through the fault, carelessness, and gross negligence of the agents, servants, and employes of the company who were operating the same, who failed to check the speed of the car or to ring the bell, or to in any manner warn him of the approach of the car, although he was standing with his back to it, and in plain view of the persons engaged in its operation. The supreme court of Missouri, division No. 1, holds that a peremptory instruction should have been given for the company. Certainly, it says, it must go by the saying that the voluntary assuming of a position upon or so near to the tracks of a street railway, over which cars are run every few minutes, that they cannot pass without inflicting an injury to the party so positioned, unless the intervention of some independent agency occurs to prevent it, is an act of the grossest negligence. If in taking the position assumed by this party, and at the same time engaging in an undertaking, as he said he was, that prevented his seeing or hearing the approach of the cars that he knew were due and liable to pass along at any moment, did not constitute an act of negligence that must be said to have contributed to the injury resulting to him on account of being run against by a car pursuing its usual course upon the track, it would be idle to search the field of practical experience for an illustration of what is termed in law an act of contributory negligence. He had no right to assume a place of danger upon the track, deliberately engage in an undertaking in such a manner as to deprive him of the senses of sight and hearing,—the common avenues through which the approach of danger is communicated,—and trust that the company's agents, in the course of their employment, would be more considerate and watchful for his safety than he himself had been. There was neither allegation nor proof that the injury was wantonly or willfully inflicted by the agents of the company in charge of its car, and, if the party injured was not entitled to recover for his injuries on account of his contributory negligence, as he himself showed, there was nothing, the court holds, left for the jury, and no possible good could come from a further prosecution of the inquiry as to the extent of the company's negligence in the case, the doctrine of comparative negligence having no recognition in this court.

NEGLIGENCE NOT SHOWN BY USE OF SHORT CAR WITHOUT GATES, NOR BY JOLT AT SIDING.

Byron v. Lynn & Boston Railroad Co. (Mass.), 58 N. E. Rep. 1015. Jan. 2, 1901.

A passenger was thrown to the ground by a swaying or jolt or lurch of a car as it returned to the main track from a siding. But upon a full consideration of the evidence, the supreme judicial court of Massachusetts is of opinion that it would not justify a finding that the company was negligent. The car, it says, was a short one, running upon a single track, and had not gates upon the platforms. But such cars are common. There is no statute (in that state) which forbids their use, or requires them to be equipped with gates. So the court holds that the use of such a car was not negligence. And then it says that such motions of street cars are of common and frequent occurrence, and are to be expected, to a greater or lesser degree, whenever the car passes from one track to another, and so are of the class of usual and unavoidable incidents in the use of cars upon the street. Unless they are unusual in degree, and caused by some defect in the car or the track, or by some unusual or dangerous rate of speed, they furnish no evidence, it holds, of negligence on the part of the carrier or of its servants. In this case, it goes on to say, there was no evidence that the jolt was due to any defect in the car or in the track, or that the car was proceeding at an extraordinary speed. The witnesses who gave an estimate of the speed placed it at from 3½ to 4 miles an hour, and there was no one who testified that the rate was either unusual or dangerous. The jar felt by the different witnesses was not so great as to be unusual, or as to justify a finding that it was due to negligence. Hence, exceptions to a judgment in favor of the company were overruled.

TROLLEY ROAD ON COUNTRY HIGHWAY NOT AN ADDITIONAL SERVITUDE.

Ehret v. Camden & Trenton Railroad Co. (N. J. Ch.), 47 Atl. Rep. 562. Nov. 27, 1900.

A trolley railway upon a country highway, the court of chancery of New Jersey holds, is not an additional servitude upon the land of the abutting owner, who owns to the middle of the road. It says that it fails to perceive any difference in the easement which the public has in a country road, on the one hand, or a city street, on the other, which would make a trolley railway operated under the act of 1893 an additional servitude in the one instance, and not in the other, and the law, it says, is settled that a trolley road in a city does not entitle to compensation. There being no intimation that the cars or motive power or speed or tracks are to be different from other roads known under the name of "trolley railways," it says it must be assumed that the road is to be used as an ordinary street railroad, the motive power of which is electricity. The features of such a road are that its tracks are laid so as not to interfere with the use of the surface of the road by other vehicles; that its cars are of such size, and run at such a speed, as not to interfere with other traffic; that such stops are made as will accommodate those living along the line of the road. So used, the court declares that it does not perceive the least difference in the adaptability of such a road to the uses of a highway, whether it be a country road or a municipal street. Its design is to serve the primary purposes of a highway, namely, to enable people to pass from one place to another. If a distinction is to be drawn between the highways and streets, upon what line shall they be distinguished? If density of population along the highway is to be the criterion, how closely must the houses stand? Must they be within 50 feet, 50 yards, or 500 yards, to destroy the right of an abutting owner to damages? If the test is to be a corporate test, and all roads lying within townships to be within one class, and all roads within other municipalities within the other class, what is the substantial basis of difference? The court can perceive none. Then, again, a rural community in a short time may become an urban community, and thus the abutter upon a highway, who now has a right to damages for the location in front of his premises of a street railway, the next year may be stripped of that right by the fact that neighbors have built in his vicinage, or because the lines of a borough have been extended so as to include his property. In conclusion, the court says that, as it must assume that the structure to be constructed on the highway in question is to serve the public within the township in exactly the same manner as within a municipal corporation, it cannot perceive why the road does not serve the people of a township in the same way as the people of a city.

RIGHTS AND DUTIES OF CITY STREET SWEEPER ON TRACK.

Dipalo v. Third Avenue Railroad Co. (N. Y. Sup.), 67 N. Y. Supp. 421. Dec. 7, 1900.

A street sweeper in the employ of the city, while bending over, sweeping between the rails of a street railway track, and facing to the south, was struck, as he alleged, by a north-bound car. The trial justice, in his instructions to the jury, charged that, as a street sweeper, the man had a right to be where he was; that he was bound to use ordinary care, and that the company was also bound to use ordinary care in not running him down. The ordinary care which this charge required of the sweeper, the first appellate division of the supreme court of New York holds, referred to the conditions under which he was at the time working; and that measure of care, namely, ordinary care, was only another way of stating that it was his duty to exercise reasonable care to avoid injury. The charge in this respect, it holds, was sufficiently explicit, without amplification, and stated the proper rule, so that it was not error to refuse a request for an instruction "that the plaintiff was bound to use care commensurate with the dangers and risks of the situation." Nor does it consider that it was error to refuse a request to charge that "the plaintiff was bound to look and listen for the approach of cars, and to exercise reasonable care to avoid them and get out of their way." That was, in substance, it says, a request to charge the jury the general rule of law applying to pedestrians approaching railway tracks. That rule, in its broad statement, does not apply to persons whose duties in the public service require them to work in or upon car tracks upon a public street. In this case, a car passed the sweeper, and he immediately resumed his work upon the track, and had the right to assume that some notice of the approach of another car would be given him. But, even if he had not, it was for the jury to say whether, under the circumstances, he was bound to look and listen. The request made of the justice was that he should charge, as a matter of law, that the plaintiff was bound to look and listen for the approach of cars, and to exercise reasonable care to avoid them. As the request with reference to reasonable care was coupled with that request for a positive instruction, as matter of law, as to the duty of the plaintiff to look and listen under the conditions proven, the whole request was unavailing. Judgment for plaintiff affirmed.

SICKNESS DOES NOT ENTITLE PASSENGER TO RIDE ON PLATFORM IN VIOLATION OF RULE.

Montgomery v. Buffalo Railway Co. (N. Y.), 58 N. E. Rep. 770. Dec. 4, 1900.

A passenger with a transfer ticket boarded a street car, placed himself upon the rear platform, and tendered his ticket to the conductor. The latter called his attention to one of the company's rules, which provided that conductors should "not allow passengers to sit or stand on, or to crowd, the rear platform, but will politely request them to take seats, or to stand inside the car," and directed him to go inside the car. This the passenger declined to do, stating that he had a sick headache, was nauseated, and that he expected to be affected actively by the nausea at any moment. The conductor, however, insisted upon compliance with the rule, and, the passenger refusing compliance, the car was stopped and the passenger was ejected therefrom, though with no excessive force or physical injury. Now, the company not only had the right, but it was bound, the court of appeals of New York holds, to make rules and regulations to insure the safe, effective and comfortable operation of its corporate business; and whether any particular rule is lawful and reasonable is a question of law for the court. This particular rule being admitted to be reasonable, the court withholds its assent from the proposition that the right of enforcement might depend upon particular circumstances. It maintains that, if the rule was a reasonable one, the passenger was bound to submit to it, and that it was the duty of the conductor to enforce it. Therefore, in ejecting him from the car upon his refusal to submit, the conductor was acting lawfully in the discharge of his duty. The passenger, by his conduct, had forfeited his right to be carried any further. A railway company is not obliged to carry persons, unless they are willing to submit to, and to be bound by, the reasonable rules and regulations which it has established. This passenger, if in the physical condition described by him upon the day in question, was not obliged to travel upon the street car; but if he chose to do so, he was bound to submit to its regulations. He had no sufficient reason in law for complaining because the conductor performed his duty, and compelled him to leave the car.

COLLISION AT CROSSING—SPEED—DEFECTIVE APPLIANCES—LOOKING AND LISTENING.

Roberts v. Spokane Street Railway Co. (Wash.), 63 Pac. Rep. 506. Nov. 28, 1900.

Safety in the rate of speed, the supreme court of Washington says, is nearly always relative. Here, a boy between 10 and 11 years of age, who was riding a bicycle behind a west-bound car, turned to cross the adjoining track somewhat diagonally, at a cross street, and was struck by an east-bound car that was running at a speed of about 2½ miles an hour. The motorman testified that as soon as he saw the boy he made an effort to throw the current out of the car with the controller, and the handle broke,—pulled out of the socket,—because wired down. Then he made an effort for the reverse lever, and it came in contact with the disabled controller handle. He then threw the overhead switch, and disconnected the current from the trolley wire to the motors. Had the controller been in good condition, he could have stopped the car very nearly instantly, considering the place and rate of speed. As it was, the car, after the collision, stopped within 14 feet. Now, under all the circumstances, it could not be determined, as a matter of law, the court holds, that the rate of speed was not excessive, and the question of negligence therein was properly left to the jury.

The railway company was negligent in the operation of the car, the court further holds, because the controller handle was defective, and the car could not be stopped with the same facility as if the appliance had been sound. As to the question of negligence in one car passing another at a street crossing, it says that also was one of fact, in the light of all the evidence in the case.

Nor does the court consider that it was negligence per se, or in and of itself, for the boy to pass from behind the west-bound car for the purpose of crossing the other track. Neither does it deem it negligence per se if it is not shown that one looked and listened in crossing a street railway. Failure to look and listen before crossing the tracks of an electric railway in a public street, where the cars have not exclusive right of way, it holds, is not negligence, as a matter of law.

Judgment for the plaintiff affirmed.

EXCHANGE OF PLACES BY CONDUCTOR WITH MOTORMAN.

Gamble v. Akron, Bedford & Cleveland Railroad Co. (Ohio), 59 N. E. Rep. 99. Nov. 27, 1900.

Where a conductor on an electric car, who was also a competent motorman, temporarily exchanged places with the motorman, there being at the time no apparent danger of accident, to enable the latter to eat his dinner, and while the conductor was running the car a collision occurred with a snow-plow running around a curve in the opposite direction, solely through the fault of the company's train dispatcher, fatally injuring the conductor, the conductor, the supreme court of Ohio holds, was not chargeable with contributory negligence merely by being in the place of the motorman and standing at his post while endeavoring to avert the impending collision. It holds that where one of the company's rules merely defined the regular position of the conductor when not collecting fares, and did not prohibit him from temporarily occupying any other position, while by two general rules he had full charge of the car while in service, that this implied that he might be anywhere in the car while in the performance of duty. In an emergency—such as, for example, an accident to or sudden illness of the motorman—he might be in the vestibule in the place of the motorman, and, if competent to do so, might act as motorman. So it does not think that there was in this case any violation of either the letter or spirit of rules of the character referred to, when construed together, when the conductor temporarily exchanged places with the motorman in order that the latter might eat his dinner. Moreover, the court declares that it is not willing to accept it as the law that a motor engineer, as this conductor was for the time being, is guilty of contributory negligence merely because he remains in his dangerous position and continues his efforts to avert calamity from the passengers behind him.

NOT LIABLE FOR INJURY TO NEWSBOY KNOCKED OFF CAR IN PASSING TEAM.

Padgitt v. Moll and the Citizens' Railway Co. (Mo.), 60 S. W. Rep. 121. Dec. 18, 1900.

This action was supported by testimony which tended to show that a newsboy, ten years old, who for some time had been in the habit of jumping on the street cars as they passed along, offering his newspapers for sale, and jumping off when he had gone through a car, jumped on the running board at the front end of a grip car, offered his papers to a passenger on the front seat, and then passed on towards the rear of the grip car, behind the gripman, walking on the running board, offering his papers for sale to the passengers as he came to them, and while so doing, and holding to the stanchion, the moving car carried him against the tongue or horses of a delivery wagon backed up to the curb, which he had not seen, and which knocked him off the running board, so that he fell under the trailer, having a leg so crushed as to require amputation. At the time of the accident the car was moving at a moderate rate, the gripman was at his post looking ahead, and the conductor was on the rear platform.

Mr. Justice Valliant prepared an opinion in the case, for division No. 1 of the supreme court of Missouri, in which he said that the circuit court did not err in refusing to instruct the jury that the railway company owed the newsboy the duty of observing for his welfare the same high degree of care that it owed in respect to a passenger. The relation of the boy and the company to each other was not analogous to that of the parties in certain cases which serve to illustrate the principle that when a carrier of passengers for hire knowingly receives in its car or other conveyance a person who comes in for the purpose of being transported, and the carrier enters upon the act of carrying him, the person while being so carried is a passenger, regardless of whether he has paid or is expected to pay his fare, which principle will include mail agents and newspaper vendors on steam railroads traveling from one end of a route to the other. But, he went on to say, a newsboy jumping on and off a moving street car to sell his newspapers; not hailing to stop the car to receive him, nor signaling to stop to allow him to alight; not asking nor receiving permission, either express or tacit; not asking nor waiting for leave or license, but jumping on and off under circumstances that clearly indicate no purpose to pay fare, and no aim to be transported, but only to avail himself of the presence of persons on the car likely to buy his papers,—is in no sense a passenger, and the carrier is not under obligation to observe towards him the same degree of care that the law requires to be observed towards a person in the hands of the carrier to be transported. But the law does require of the carrier, under such circumstances, the exercise of ordinary care, as the jury was instructed.

In this, the full bench of the supreme court of Missouri, to which the case was transferred, concurs. And it holds that there was no evidence in this case to show negligence on the part of the railway company, and that for that reason the judgment rendered in its favor should be affirmed.

DUTY OF COUNTRY BOY IN CITY TO LOOK OUT FOR STREET CARS.

Wills v. Ashland Light, Power & Street Railway Co. (Wis.), 84 N. W. Rep. 998. Dec. 7, 1900.

The youth of a boy lacking 2 months of being 14 years of age, and the fact that he lived in the country and was not familiar with the movements of street railway cars, as well as the fact that he was looking at an ore train which had no necessary connection with his movements, the supreme court of Wisconsin holds, were not excuses from contributory negligence on his part. Such a boy, who had been in the city three or four times a year, it holds, was bound to know and comprehend all the dangers which were open and obvious to a boy of ordinary understanding of his age and experience, was required to look in both directions for a street car before going upon the track, and was guilty of contributory negligence in a failure to use his senses at a time when the law required him to do so.

THE DUTY OF LOOKING AND LISTENING EMPHASIZED.

Dummer v. Milwaukee Electric Railway & Light Co. (Wis.), 84 N. W. Rep. 853. Jan. 8, 1901.

Whatever difference of opinion there may be upon the subject as an original proposition, the supreme court of Wisconsin says that it is now firmly settled as a part of the law of that state that it is the duty of a person approaching the track of an electric street railway, whether he be walking, or riding in a vehicle, to look and listen for approaching cars; and that, if he fails to do so, and is injured by a car while crossing the track, he is guilty of contributory negligence as matter of law. This conclusion seems also, the court thinks, to have the weight of judicial opinion in other states in its favor. And it holds that this legal proposition necessitated a reversal of this case, because it was admitted upon the trial and found by the jury that neither the plaintiff nor the driver of the wagon upon which the plaintiff was riding seated on a long timber, looked before they started to cross the track. True, the jury found, in answer to the questions of a special verdict, that neither the plaintiff nor the driver was guilty of contributory negligence; but, the court says, the fact that they failed to look and listen having been admitted and previously found, contributory negligence was thereby established as matter of law, and the question was no longer open. Furthermore, it holds that manifest error was committed in charging, in substance, that even if they did not look, still they were not guilty of contributory negligence if a person exercising ordinary care who had looked would have considered it safe to cross the track because the car was so far away, as also that, if the plaintiff and the driver were placed in a situation of danger by the company's negligence, and were compelled to choose one of several lines of action in the presence of imminent danger, the fact that they did not choose the best means of escape did not charge them with negligence. Both of these propositions, the court holds, were erroneous; the first, because it emasculated the rule requiring a person about to cross a railway track to look and listen, and the second because it was not applicable to a case where the plaintiff, by his own negligence, had placed himself in a position of danger.

ORDINANCE MUST BE DULY PUBLISHED BEFORE LAW CHANGES AND NOT DISCRIMINATE AS TO FARES.

State ex rel. Bump v. Omaha & Council Bluffs Railway & Bridge Co. (Ia.), 84 N. W. Rep. 983. Jan. 19, 1901.

Where is is required that "all by-laws of a general or permanent nature" shall be published in some newspaper of general circulation, the supreme court of Iowa holds that this includes ordinances granting franchises. And where it is further provided that such by-laws "shall take effect and be in force at the expiration of 5 days after they have been published," the court is of the opinion that publication is essential to the validity of such by-laws and ordinances, and that it cannot be maintained that such an ordinance is valid, although not published, a subsequent publication being merely a condition to its enforcement. In other words, it holds that the provision about publication is not directory only, but compliance with it is essential to the validity of an ordinance. Hence, it holds that where this step has not been taken as required by law, and during the time when such an ordinance might be enacted, the ordinance fails. Consequently, it holds invalid an ordinance passed under a certain law authorizing it while that law was still in effect, but which was not published until after a different law superseded that one, when the old law required publication as above.

A publication in an extra edition of 50 or 100 copies issued at 11 o'clock at night, and not mailed to subscribers or otherwise distributed, except as sold by parties directly interested, the court holds is not an official publication and therefore is not sufficient to give validity to such an ordinance.

Again, the court says that there can be no question but that the defendant, whose business, under this franchise, included the transportation of persons between Council Bluffs and Omaha, was engaged in interstate commerce, and any regulation of rates discriminating in favor of the citizens of Iowa as against those of another state, as that commutation tickets should be for sale to residents of Council Bluffs at not to exceed a certain price, must necessarily be invalid. Besides, it holds that an ordinance giving a privilege in this respect to citizens of Council Bluffs not enjoyed by other citizens of the state of Iowa is invalid under the provision of the constitution of Iowa which requires that laws of a general nature shall have uniform operation.

RIGHTS AND DUTIES OF A PERSON IN CROSSING A TRACK—CONTRIBUTORY NEGLIGENCE.

Tesch v. Milwaukee Electric Railway & Light Co. (Wis.), 84 N. W. Rep. 823. Jan. 8, 1901.

The supreme court of Wisconsin holds that before crossing a railway track, regardless of whether it be a steam or electric street railroad, a person should look both ways and listen for a coming car and perform that duty when and where it will be reasonably certain to effect its purpose; and diversion of attention, generally speaking, will not excuse the performance of such duty; neither will misconduct on the part of the railway company.

An ordinary traveler upon a public street where a street car line is located and operated under a public franchise having no restrictions or regulations as to the manner of operating cars, but has not the same right to go upon the track and compel the stopping of a car to enable him to pass over the track as the operator of the car has to delay his passage to enable the car to pass. The ordinary traveler has the right of way in crossing a street car track in advance of an approaching car, if, calculating reasonably from the standpoint of a person of ordinary care and intelligence so circumstanced, he has sufficient time, proceeding reasonably, to clear the track without retarding the movement of the car if its rate of speed is lawful, and if it turns out that he has miscalculated, he is not chargeable with want or ordinary care or with violating any rights of the railroad company if it is compelled to retard the motion or the car or even stop it to enable such person to cross the track; and in no event is such a person a wrongdoer so as to excuse the operator of the car from not exercising ordinary care to avoid injuring such person, though the fault of such person may preclude him from recovering damages for any injury that may result in part from his conduct.

If a person about to cross a street car track in the circumstances above stated, observes a car that is coming towards him at an unreasonable rate of speed, or if in the exercise of ordinary care he ought to observe it, such care requires him to take that into consideration in determining the probability of his being able, proceeding reasonably under the circumstances, to clear the track and avoid being injured by a collision with the car.

The Wisconsin doctrine, the court further says, is that contributory negligence of the plaintiff, however slight, precludes his recovering of the defendant on the ground of negligence, regardless of the degree thereof, speaking of conduct characterized by inadvertence, not that misconduct known in the Wisconsin decisions as gross negligence.

VALIDITY OF CONTRACTS OF PURCHASE OF CONSENTS.

Montclair Military Academy v. North Jersey Street Railway Co. (N. J. Sup.), 47 Atl. Rep. 890. Dec. 29, 1900.

A good cause of action for breach of contract is stated, the supreme court of New Jersey holds, where an abutter alleges that an agreement was made to pay for a consent to the construction of an electric street railway, which consent was in consequence given, and was used to help meet the requirements of the statute, but was not paid for as per the agreement, the alleged consideration in this case being an option at a certain price on a certain amount of bonds and stock. It does not consider that such a contract is inoperative and void as against public policy. Independently of any legislative authority, it says that it seems to be quite clear that, if a company should contract with abutting owners for the privilege of laying its tracks in front of their premises, such a contract would have sufficient consideration, and would be valid and enforceable at law. And in a statute which makes the consent of the owners of a certain proportion of abutting land necessary to authorize the local governing body to grant the use of the street or highway it sees no warrant for an assumption that these consents are to be influenced solely by the consideration whether such a use of the street is promotive of public policy. The landowners are not vested with the jurisdiction to determine whether such an improvement will be for the public benefit or not. They have no power to license or to prohibit. That jurisdiction is vested in the local public authorities.

The privilege conferred upon the owners of lands fronting on the street on which a street railway is proposed to be built is conferred upon them solely for the protection of their own property rights. Then, the court says that if these consents as a condition precedent to the action of the local authorities be injudicious, or even obnoxious to public policy, the fault is with the legislature. The terms on which the consents should be given being left to be adjusted between the owners of the land and the company, the local authorities would not be justified in rejecting a consent for the reason that it was obtained for a consideration, or in refusing to consider the company's application for a license on the ground that it had made compensation to the owners of lands abutting on the street for the inconvenience they might suffer by reason of the construction of the railway, the erection of poles and wires, and the operation of the road. Nor does the court perceive on what ground a bargain of this character with one landowner can be said to be a fraud on other landowners or upon the public in general.

PASSENGER RIDING ON SIDE STEP OF OPEN SUMMER CAR—MOTORMAN'S DUTY.

Bumbear v. United Traction Co. (Pa.), 47 Atl. Rep. 961. Jan 7, 1901.

The supreme court of Pennsylvania says that, generally, it is the duty of a passenger to go inside the car. In the use of the cars of steam railroads the rule admits of no exception which does not rest on necessity. While it is not per se or in and of itself negligent for a passenger on a car of a horse railway to stand on the platform or steps, it is his duty to go inside the car if there is room. As to the danger of riding on platforms or steps, electric trolley cars occupy an intermediate position, and the established rules in regard to steam and horse cars do not apply to them without modification. The side steps of an open summer car are not intended for the use of passengers except as a means of ingress. Their use for riding differs, in point of danger, but slightly from the use of the bumper, which is per se negligent. And it is so manifestly dangerous as generally to defeat any claim for injuries. A passenger who rides on them when it is reasonably practicable for him to go inside the car assumes all the risks of his position, and in all cases he assumes the risk incident to the usual swaying and jolting of the car, and from collision with passing vehicles, and with obstructions, of whatever nature, which unexpectedly appear.

These are dangers which cannot be guarded against by the careful and prudent management of the car. But when the passenger, by invitation of the conductor or with his knowledge and assent, and from necessity, because of the want of sitting or standing room inside the car, rides on the side steps, he is entitled to the same degree of diligence to protect him from dangers which are known and may readily be guarded against as other passengers.

In this case, a man going to his work one morning got on the side step of an open car, which car, as usual at that time of the day, was full so that there was no standing room inside or on the platform. The conductor received his fare, and made no objection to his standing on the step. At a place where the street curved and there was barely room for a wagon to stand between the track and the walls of a hotel building and ice wagons were accustomed to stand while delivering ice mornings, he was injured by the hub of a wheel of an ice wagon striking him. Moreover, the motorman could have seen the position of the wagon when a square from it, and was even signaled by the man in charge of the wagon to stop, but went on without slackening the speed of the car. Under these circumstances, the court holds that it was error to grant a compulsory nonsuit. It holds that as the man was received as a passenger when the car was so full that he could not go inside, and stood on the step with the knowledge and assent of the conductor, he could assume that reasonable precautions would be taken to protect him from such dangers as could be readily seen and guarded against, and, as the presence of ice wagons in the narrow space between the track and the building was to be expected at about the same time every morning, it was a known danger, against which it was the duty of the motorman to guard.

BOARDING CAR AT FRONT END.

Townsend v. Binghampton Railroad Co. (N. Y. Sup.), 68 N. Y. Supp. 121. Jan. 9, 1901.

The plaintiff boarded an electric street car at the front platform. He claimed that he tried to enter the front door, and take a seat inside, but could not open it. At a sharp curve he was thrown off and seriously injured. The jury was instructed: "Under the circumstances disclosed by the evidence in the case, it was the duty of the plaintiff to get on the car by the rear platform, and seat himself inside, if he could do so by reasonable effort, and his failure so to do was negligence on his part." This instruction, however, the third appellate division of the supreme court of New

York holds was erroneous, in that the jury was substantially told by it that the question of the plaintiff's contributory negligence depended upon whether he, by reasonable effort, could have boarded the car at the rear end, which there was no real claim during the trial that he could not have done. Clearly, it declares, it could not be said, as matter of law, that it was negligence for him to board the car at the front end, even though he might have easily got on the rear end. Both entrances to the car were alike, and there was no reason why the front one should not have beeen used as well as the rear one. There was no notice to the plaintiff forbidding him to do so—no reason apparent to him why he could not safely enter in that way.

NEED NOT ANTICIPATE CHILD BEING UNDER DELAYED CAR.

Siacik v. Northern Railway Co. (Md.), 48 Atl. Rep. 149. Jan. 16, 1901.

The court of appeals of Maryland practically suggests here that if a street car is delayed on the street for half an hour that it is not incumbent on those in charge of it to look under the car to see whether a child is there, unless there is something to show that they have cause to believe that such might be the case.

LIABILITY FOR INJURY IN COLLISION OF TRACK-LAYER RIDING HOME ON TICKET.

Peterson v. Seattle Traction Co. (Wash.), 63 Pac. Rep. 539. Dec. 27, 1900.

This was an action brought by a track-layer to recover damages for personal injuries sustained in a collision of electric cars when he was returning home on one of them after his day's work was done, riding on a ticket from a book furnished him. The supreme court of Washington holds that he was not a fellow servant of the operators of the cars at the time of the accident. It maintains that when he had ceased his day's work at track-laying he was not in the employ or under the control of the company until he again resumed track-laying under the superintendency of the foreman of the track gang. The foreman had no control over him while going to and from his work, and he was not under any obligation to go to and from his work of track-laying on the cars of the company. At 6 o'clock his day's work ended. He had no rights and no privileges on that car, other than or different from those of any other passenger. He was not required to perform services on the car. He was under the control of the conductor of the car, and not of his own foreman, just as any other passenger on the car. Hence, the court holds that at the time of the accident he was not a servant of the company, and that, consequently, the doctrine of fellow servants had no application.

And the court holds that where two cars meet in a head-end collision on a single-track railway, there must be negligence somewhere, by somebody or other. That negligence, in the absence of other showing, must be assumed to have been primarily the negligence of the company's employes in charge of the cars, who caused or allowed them to come into collision. It being primarily the negligence of those employes, it is imputable to their employer, and that employer is in law responsible for its consequences.

But the book of tickets furnished had a stipulation printed thereon exempting the company from any liability for injury to this track-layer, and the company denied that it had agreed to furnish him transportation, while he alleged that his contract of employment provided for transportation without any condition upon it exempting the company from liability. And the court holds that when he offered his evidence as to his transportation, and the tickets in connection therewith, under the denial of the company, it was competent for it to offer in evidence any material matter to defeat the alleged contract or to show a different contract. It particularly holds that it was error to exclude evidence of the stipulation, and that it was signed by the man. It says that the company was not required by law or duty to give him work as a track-layer, and, when he sought to obtain such work, he had a perfect right to contract that he should be carried by the company over its lines to and from his work, subject to the condition that he would assume, while being so transported, all risks of accidents, etc., contained in the stipulation mentioned. However, it does not mean to hold that the mere signing of the condition, under the circumstances under which it was signed, was conclusive on the man, as showing that the contract of transportation was as claimed by the company. If the transportation was to be unconditional, he was a passenger for hire, and entitled to all his rights as such. The fact that he was employed by the day, and could quit at any time, and that he received from time to time ticket books with conditions thereon like that offered to be proven, would be strong circumstances to show that the contract for transportation was as the company contended, but it was not conclusive. It must be remembered that there was no showing or offer to show that the secretary who gave out the book, got the man's signature to the stipulation and signed it himself, was authorized to enter into contracts for the employment of track-layers, or that he was authorized to bring about a modification of the contract originally made by the foreman, and that at the time the latter employed this man nothing was said about his transportation having a stipulation attached which should exempt the company from liability. All these facts and the circumstances under which the condition was signed were for the consideration of the jury, under proper instructions, from which it might determine whether the contract of transportation was unconditional, as claimed by the man, or was conditional, as claimed by the company.

LIABILITY FOR INJURY OF EMPLOYE RIDING FREE WHILE NOT ON DUTY.

Dickinson v. West End Street Railway Co. (Mass.), 59 N. E. Rep. 60. Jan. 2, 1901.

Persons riding gratuitously under a rule permitting policemen, firemen, advertising agents, news agents, and employes of the company in uniform to ride free at any time, such persons being required to ride upon the front platform, so far as practicable, the supreme judicial court of Massachusetts holds, are passengers, as well as those who pay their fare. All members of the classes included in the rule stand alike in reference to the duty of care which the company owes them, whether they come within one part of the description or another. The rule in reference to employes permits them to ride at any time and place, and for any purpose, if they are in uniform. The reasons in each case for extending this privilege to members of these different classes are not material. Probably they are different in reference to different classes. So far as employes are concerned, it is enough that, except possibly in regard to wearing uniform, they are given the same rights as others who have no direct connection with the company by employment or otherwise.

In this case, an employe, whose work consisted of a certain number of trips at fixed and regular times each day, who usually had about three hours, between twelve and three o'clock, during which he was not on actual duty, having, at about 12 o'clock one day, finished his morning's work, got on the first car that came along, and was going home to dinner, when he was injured through the negligence of the motorman on that car, which, it may be added, was not on the line on which he was employed. Under these circumstances, the court holds, he did not stand in the relation of a servant to the company at the time of the accident, and consequently was not a fellow servant of the motorman so as to relieve the company from liability to him for the latter's negligence. His rights, the court holds, were the same as if, after finishing his day's service, he had taken a car in the evening to visit a friend or to do any business of his own. The fact that he had been in the company's service during the day would not make him a fellow servant with the motorman while riding in the evening under the rule, any more than if he had been a policeman or a news dealer.

CONTRACT TO TRANSFER SPECIAL CHARTER ILLEGAL.

Simonds v. East Windsor Electric Railway Co. (Conn.), 48 Atl. Rep. 210. Feb. 6, 1901.

A contract by parties getting a special charter from the general assembly for building and operating a railroad upon the public highway to transfer the charter and franchise to another to build the road, the organization to be forthwith put into the hands of persons to be named by him, the supreme court of errors of Connecticut holds is illegal, and, being illegal, they cannot force a retransfer to themselves of the charter after having so transferred it and the party referred to failed to carry out his part of the agreement. Nor can they claim a cancellation of their subscriptions on the ground that they were induced by his fraud.

SUSPENDING FEED WIRES OVER LAND BY POLES OUTSIDE VIOLATES INJUNCTION.

Alcorn v. Newark & Hackensack Traction Co. (N. J. Ch.), 48 Atl. Rep. 235. Feb. 4, 1901.

An injunction restraining a company "from erecting poles and stringing wires or other electrical conductors upon said land and premises, or any part thereof," referring for example to a farm, the court of chancery of New Jersey holds is violated by the company stringing and suspending two feed wires across the premises although the poles from which they are suspended are placed outside the farm boundaries. It holds, furthermore, that an injunction against erecting poles and stringing wires is an injunction against either of the acts, and that "stringing wires upon the land" in a preliminary injunction designed to preserve the status quo or existing conditions pending a final hearing and until condemnation proceedings means stringing wires over the land. Besides, the court says that it seems to it that such wires suspended across a farm and used for conducting the motive power of a railway which is in operation on both sides of the farm as a continuous line are part of the construction of an electric railway across the farm, and, as such construction of an electric railroad are a clear violation of an injunction against constructing a railroad upon or across the premises without compensation first made. Then, it holds that a company cannot assume to decide for itself that rights subsequently acquired by it terminate an injunction which on its face is expressly valid until a hearing on the record or until the court otherwise orders.

PRIORITY OF CLAIM FOR RAIL JOINTS AND TRACK BOLTS.

Lee v. Pennsylvania Traction Co. (U. S. C. C., Pa.), 105 Fed. Rep. 405. Dec. 24, 1900.

A claim for rail joints and track bolts furnished to a traction company within six months before the appointment of a receiver, the United States circuit court, eastern district of Pennsylvania, holds, is superior in equity to a mortgage previously given by the company and is therefore entitled to a preference on the mortgage being foreclosed, such supplies having been dry by day supplies necessary to keep the property a going concern, and not used for the reconstruction of the road. The insolvent company, it thinks, may, in such a case, properly be regarded as having been the agent of the bondholders in keeping the railway a going concern, and to this end in contracting for the needful material.

WHEN LOOKING SOME TIME PRIOR TO ATTEMPTING TO CROSS TRACK IS SUFFICIENT.

Hays v. Tacoma Railway & Power Co. (U. S. C. C.), 106 Fed. Rep. 48. Sept. 14, 1900.

The United States circuit court, in the state of Washington, thinks that the better reason is with the courts that incline to the view that the rule of looking immediately before crossing a street railway track its not a fixed one, but that if one looks at such a time prior to crossing, and takes such observation as will justify him in assuming that no collision can occur provided the cars are running at a lawful rate of speed, he is not necessarily guilty of contributory negligence if he fails to take further precaution, or if he proceeds on his way relying upon the presumption that the street car company will comply with the law. In line with this, it refuses to hold here that the plaintiff was guilty of contributory negligence, which would preclude his right to recover damages, in attempting to cross a single street railway track without looking at the time for an approaching car when he had driven in a covered wagon 400 feet from the point where he had looked, having an unobstructed view for about 1,400 feet, and saw no car in sight, and there was evidence tending to show that the car which struck him came up at a speed of 24 miles an hour, or double the authorized rate of speed, and that if the car had conformed to the ordinance limiting speed no collision could have occurred.

LIABILITY FOR EJECTION AND SUBSEQUENT ARREST OF PASSENGER ON JOINT-CONTRACT TRANSFER.

Jacobs vs. Third Avenue Railroad Co., 68 N. Y. Supp. 623. Jan. 18, 1901.

The general term of the city court of New York says that the contract to carry the plaintiff as a passenger was a joint one on the part of both railway companies (the defendant and another street railway company), and that each was responsible for the acts of the other in the performance of the same. Plaintiff having paid his fare and received a transfer ticket, entitling him to ride, in accordance with the contract between the railway companies, over both their lines, was properly a passenger upon the defendant's car, and the conductor thereof had no right to eject him therefrom. The fact that the plaintiff was not arrested until after he had alighted from the car was immaterial. The ejection and subsequent arrest constituted one continuous act, and, that act being unlawful, the defendant, the court holds, was liable therefor.

INJURY TO PASSENGER AFTER ALIGHTING CAUSED BY CONDUCTOR STANDING ON HER SKIRT.

Citizens' Street Railway Co. v. Shepherd (Ind. App.), 59 N. E. Rep. 349. Jan. 25, 1901.

This was an action for damages against the street railway company. It was alleged in the complaint that the party bringing it was a passenger on one of the company's cars. It was a dark night, and raining. She was accompanied by three small children, one of whom she held in her arms. When she arrived at the point where she desired to leave the car, she helped her children out, and the conductor helped her alight. Upon inquiry by her he instructed her as to the direction to go, and stepped back upon the car step. In some manner, her skirt had not been removed from the car step, and was stepped on by the conductor. The car moved away with the conductor standing with one foot on her dress skirt, and pulled her to the ground, inflicting the alleged injuries for which she brought this action. The appellate court of Indiana holds that the facts stated were sufficient to show a cause of action, and that there was no error in overruling a demurrer to the complaint.

RATES OF FARE GOVERNING INTERURBAN ROAD.

Coy v. Detroit, Ypsilanti & Ann Arbor Railway (Mich.), 85 N. W. Rep. 6. Jan. 29, 1901.

Certain rates of fare having been fixed for each of the several townships through which an interurban electric railway runs, the supreme court of Michigan holds that a through passenger, so called, is entitled to ride, without having previously procured a ticket therefor, at the sum of the fares fixed for the townships in whole or in part traversed, and cannot be charged extra for passing through villages in such townships, although perhaps an additional fare may be collected for transportation through a city in one of the townships. It also holds that where a village which has authority to enter into such a contract, which authority was taken to be conceded in this case, contracts for the carriage of any single passenger for a continuous trip between any two points on the line between certain cities at say the rate of 1½ cents per mile, though no fare should be less than 5 cents, any member of the public, without regard to his place of residence, may claim the benefit of that rate, and it is not essential to entitle a passenger to that rate that he should have a ticket.

RIGHT TO INJUNCTION AGAINST PASSENGERS ENDEAVORING TO RIDE WITHOUT PAYING DISPUTED FARES.

Milwaukee Electric Railway & Light Co. v. Bradley et al. (Wis.), 84 N. W. Rep. 870. Jan. 8, 1901.

This was an action to restrain the defendants from interfering with the company's business by endeavoring to ride upon its street cars without paying the fare demanded pursuant to its alleged lawful regulations, and to judicially establish the validity of such regulations; also to enjoin the prosecution of numerous suits brought against the company growing out of its enforcing such regulations, and to enjoin the commencement of further suits of the same character. It appeared that the right of the company to collect the disputed fares depends upon questions of law arising on undisputed facts. The supreme court of Wisconsin says of it that it was engaged in quasi public work that could not be disturbed by daily contests with patrons over its right to the fares demanded, without great and irreparable injury to its interests if it was acting in the right, and great prejudice to the traveling public desiring the benefit of its service, as well. Then, for the purposes of this case, without any intention of deciding it on its merits, the court looked to see if the record disclosed that the right claimed by the company might probably be vindicated by the final decree in the case, and, finding that it might be, the court holds that it was error to vacate the temporary injunction granted, the damages that might probably result to the defendants by reason of the injunction, in case the company finally failed in the litigation, being trifling and easily indemnified against by the bond on its part given as a condition of the injunction. In other words, the court holds that if it be clear that the plaintiff may probably recover, and that if it be left at the mercy of its adversaries the purpose of the litigation may be defeated or it may suffer irreparable loss, it is within judicial discretion to so control the situation as to prevent that result so far as practicable, having regard for the rights of the defendants as well as those of the plaintiff.

CARE REQUIRED IN REMOVING SNOW FROM TRACK.

Newport News & Old Point Railway & Electric Co. v. Bradford (Va.), 37 S. E. Rep. 807. Jan. 17, 1901.

From the necessity of the case, it would seem, the supreme court of appeals of Virginia says, that a street car company, in operating its cars upon a street, would have the right to remove snow from its track to another part of the street; but in doing so it would not have the right to bank up the snow so as to make it dangerous to use or cross the street, unless the work of cleaning the track necessarily obstructs passage, and then the company is bound to do all that ordinary care requires in removing the obstruction. Furthermore, the court pronounces misleading, if not erroneous, an instruction which said, in effect, to the jury that if they believed that the snowstorm causing the deposit of snow on the track was an extraordinary one, then it was the duty of the company to use extraordinary exertions not to create obstructions at street crossings. It was the duty of the company, the court holds, to exercise ordinary care and prudence in removing the snow from its track. What was ordinary care depended upon the facts of the particular case. That which would be ordinary care in one case might be gross negligence in another. But the mere fact that the deposit of snow upon the track was caused by an extraordinary snowstorm did not require the company to use extraordinary exertions to avoid obstructing street crossings in removing the snow, but only required it to use that degree of care and prudence which ordinarily prudent persons exercise under like circumstances.

RIGHTS OF DRIVER OF WAGON ON TRACK IN CITY STREET.

Cohen v. Metropolitan Street Railway Co. (N. Y. Sup.), 68 N. Y. Supp. 830. Feb. 25, 1901.

The appellate term of the supreme court of New York holds that a dismissal of the complaint in this case could not be justified on the ground that "the plaintiffs, in entering upon the defendant's tracks and driving thereon for a distance of two blocks, or over four hundred feet, were guilty of such contributory negligence as to entirely preclude a recovery for the damages sustained." This, it declares, is not the law. A driver of a vehicle in a city street has a right to expect that street cars will be managed with reasonable care, and with a proper regard for the rights of others lawfully using the public thoroughfare. And it is said here that it is apprehended that the true rule is that a driver of a wagon in a city street may drive along the track in full view of an approaching car, and that the fact that he so proceeds for 400 feet or any other distance will not charge him with contributory negligence, if, under all the circumstances, his conduct is consistent with ordinary prudence. The only limitation of the driver's right is that he must not necessarily interfere with the passage of the car, which, although entitled to a preference, does not possess the exclusive right to the use of the tracks.

It cannot be held, in the situation disclosed by the record in this case, the court says, that it was negligence per se or in and of itself for the driver to fail to look behind him for an approaching car. The accident occurred in a populous city street in the daytime. The horse and wagon were lawfully upon the street. The wagon was covered on the sides and rear. It was very difficult for the driver to look to the rear. He had just reached the intersecting street, into which he was turning from the track. At the time of the collision the horse and the greater part of the wagon were off the track. While turning out of the track he was required to exercise reasonable care, and he had a right to assume that those in charge of the car would employ the like degree of care to avoid injuring him. As both were approaching a street crossing, the motorman, if he was looking ahead, as he was especially required to do at such a time, could not fail to note the presence of the wagon, while the driver of the wagon at the same time was required to be vigilant in observing the crosswalk, where he should anticipate the presence of pedestrians. Under these conditions, the court holds, it was peculiarly a question of fact as to whether reasonable care required the driver to look towards the rear or do anything else before he proceeded to turn out of the track. Wherefor the dismissal of the complant was erroneous, requiring a reversal of judgment.

STATUTORY LIABILITY FOR PAVING CANNOT BE CHANGED BY AGREEMENT—WHAT IS ROADBED.

City of Shreveport v. Shreveport City Railway Co. (La.), 29 So. Rep. 129. On rehearing, Jan. 31, 1901.

Louisiana Act No. 10 of 1896 authorizes the assessment of street railway companies for the paving of streets through which their roads run, and, in specific terms, establishes the basis upon which the liability of such companies is to be ascertained; and, the supreme court of Louisiana holds, it is incompetent for a municipal corporation and a railway company, by convention, to change the basis so established so as to reduce such liability below that properly arising under the statute.

Furthermore, in this case, an obligation with respect to street maintenace, entered into prior to the passage of the act of 1896, and predicated upon a franchise for a single-track road, having been superseded by a compromise, also relating to a single-track road, and entered into and after the passage of that act, and such compromise having been thereafter annulled by a contract providing for the construction and maintenance of a double-track road, the fact that the stipulation in the last contract, with respect to the liability of the railway companies for paving, could not be enforced, because repugnant to law, the court holds, did not revive the pre-existing convention on the subject, inasmuch as the surrender of the franchise for the double track was neither demanded upon the one hand, nor tendered upon the other, but, on the contrary, said franchise was used for the purpose for which it was granted. Under these circumstances, the court holds, the liability of the companies for paving, as far as concerned both tracks, should be determined by the statute, and, as thus determined, was in proportion to the space occupied by their roadbeds as compared with the entire space to be paved. It also holds that the graded and prepared soil, the cross-ties laid thereon, with the ballast and surfacing, made up the roadbed, and that its width was represented by the length of the cross-ties, and not by the space between the outer edges of the rails, nor yet by such space, plus "clearance space," upon either side of the track.

NOT BOUND TO LOOK ALL OF THE TIME FOR CAR.

R. F. Stevens Co. v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 68 N. Y. Supp. 1088. Mar. 8, 1901

In affirming a judgment against the railroad company for damages caused by a collision of one of its cars with a milk wagon at a point where the driver of the latter could not look with safety in one direction all of the time, he being liable to danger on three sides, the second appellate division of the supreme court of New York says that it is not ordinarily necessary, in order to take the case to the jury, for the plaintiff to swear that he looked every instant of the time, or while passing over every foot of the ground.

RIGHTS AND DUTIES RELATIVE TO STOPPING, STARTING, AND BOARDING CAR, ON SIGNAL.

Citizens' Street Railway Co. v. Merl (Ind. App.), 59 N. E. Rep. 491. Feb. 20, 1901.

A portion of the north track on an east and west street where there were double tracks being torn up, all cars were at that point run on the south track. This necessitated a passenger desiring to take a west-bound car there to board the same on the side next to the poles between the track. The car in question was an open summer one, with the seats on the front end and in the middle of the car crowded, and while he was going along the running board to the rear of the car to obtain a seat or standing room he was struck in the back and head by coming in contact with one of the poles, the car having in the meantime been started rapidly forward. The appellate court of Indiana affirms a judgment in his favor.

Part of an instruction given the jury was as follows: "Negligence of the defendant [company] in running past the plaintiff [Meri] upon the street, whether he had signaled or not, or whether he was at a station for receiving passengers or not, would not authorize or make it right for the plaintiff to commit an act of negligence in getting upon the car to prevent being left behind. And if you are of the opinion that, at the time of his accident, plaintiff voluntarily threw himself upon a known or perfectly apparent danger, or assumed a perfectly clear or palpable risk, he cannot now recover damages of the defendant, even though the servants of the defendant were also negligent." This, the court says, was a plain and correct statement of the law.

When a person desires to take passage on a street car, and signals such car, indicating his intention, if such person be at a point or place on the line where such car is required to stop to receive passengers, if the car is stopped, or its speed slackened, the company, the court holds, thus extends an invitation to such person to become a passenger, and he has a right to enter. He becomes a passenger, under such circumstances, as soon as he steps upon the running board or steps of the car, and the company is bound to treat him as a passenger. This proposition presupposes the fact that the employes in charge of the car are aware of the facts stated. A person about to take passage upon a street railway car, he himself being without fault, has a right to rely upon an opportunity being given him to enter it in safety, or of being notified of any apparent danger foreseen by employes. It is also well settled that carriers of passengers are required to give passengers ample or reasonable time to get on and off cars.

Then, the jury was told that if it found that the plaintiff signaled the car, and that its speed was slackened at or near a crossing where the company was accustomed to receive passengers, and that it was apparently safe for him to board the car, it was not necessarily negligence, as a matter of law, for him to attempt to get on the car while it was in motion. It was also told that he had a right to rely upon the watchfulness and care which it was the duty of the conductor to bestow towards persons about to take passage, and that he was not bound to anticipate that the car would start rapidly, or that he might be thrown against the pole, etc. The court holds that this was a correct statement of the law. And it adds that when a person enters a street car as a passenger, it is the duty of the conductor in charge of the car to see that he is in a place of safety before he gives the signal to start.

Again, the jury was instructed that if it found that the plaintiff got on the car at a place other than a proper stopping place, while the car was in motion, and without the knowledge of the employes in charge of the car, he could not thus become a passenger; and that under such facts, if the employes, after they learned such facts, immediately attempted to stop the car to prevent an injury to him, by using the care and diligence required by law, then the company would not be chargeable with negligence, and the verdict should be for the company. This instruction, it was urged was erroneous because it said that it was the duty of the company to exercise the highest degree of diligence towards a trespasser after he was discovered. But the court is unable to see how such a construction could be put upon the instruction, the sum and substance of which, it thinks, was but the Indiana rule that a common carrier owes a trespasser no protection against negligence, and owes him only reasonable care to avoid injuring him, when his presence and his own inability to avoid injury are known to it.

INEFFECTIVE NOTICE FORBIDDING RIDING ON FRONT PLATFORM.

Sweetland v. Lynn & Boston Railroad Co. (Mass.), 59 N. E. Rep. 443. Feb. 26, 1901.

An electric car from which a passenger riding on the front platform thereof was thrown and injured had a sign attached to its hood which read as follows: "Notice. All persons are forbidden to be on the front platform of this car, and this company will not be responsible for their safety. Per orders of the directors." This, the supreme judicial court of Massachusetts says, purported to be a prohibition of passengers from riding on the front platform, and not a notice stating the terms on which they might ride. And it holds that the jury was rightly istructed that such a rule would be reasonable, and that, if the passenger was intentionally violating the rule, he could not recover damages for his injury. But it also sees no error in that the jury was permitted to find that, notwithstanding the sign, the rule, if it ever was intended to be a rule, had been allowed by the company to become a dead letter, so that in effect the case was as if there never had been such a rule. The court says that it has no doubt that a railroad company, after making a rule in regard to the conduct of passengers, may waive and abandon it, and treat passengers as if it had never existed, and thus lead them to believe that the rule is no longer in force. If a railroad company does this, it cannot set up the rule to defeat the rightful claim of a passenger who has acted in the well-warranted belief that the rule is not in force. If such signs as this are placed over the front platform of cars, and if afterwards the persons in charge of the cars are accustomed to receive passengers upon the cars in such numbers as to crowd the front and rear platforms, as well as the other parts of the cars, and the passengers are permitted to ride freely and without question upon the front platforms, paying for so riding the usual fare, the passengers may well believe, and the jury may well find, that the notice was not intended as a rule to be obeyed, and that the front platforms were intended by the company to be used by passengers. The officers of the company might be supposed to know the habitual methods of their servants in managing their cars. Exceptions to a judgment in favor of the plaintiff overruled.

PASSENGER ON WRONG TRANSFER MUST OBEY DEMAND TO PAY FARE OR GET OFF CAR.

Kiley v. Chicago City Railway Co. (Ill.), 59 N. E. Rep. 794. Feb. 20, 1901.

In affirming a judgment for one dollar in favor of the party who was suing here for damages for a forcible expulsion from a street car, from which judgment such party appealed, the supreme court of Illinois holds that where a passenger is by mistake given a wrong transfer ticket, which the conductor of the car transferred to refuses to accept, insisting that the passenger pay another fare or get off, the passenger must do the one thing or the other, relying upon the right of holding the company responsible in a civil action for the consequences if thereby compelled to wrongfully leave the car. But the passenger refusing to pay the fare thus demanded has no right to resist being put off the car by the conductor, and if injuries are sustained by reason of a forcible expulsion on account of such resistance no damages can be recovered therefor.

SUPERIOR RIGHT OF WAY OF STREET CARS.

North Chicago Street Railroad Co. v. Smadraff (Ill.), 59 N. E. Rep. 527. Feb. 20, 1901.

The supreme court of Illinois holds that it is not true that street cars have, "at all times and under all circumstances, a superior right of way along their lines except at street crossings," because, it says, although street cars have a superior right of way to the general travel on streets at places other than crossings, to the extent that those traveling by other means must get off the tracks and give the right of way to moving cars, for the reason that they can get off the track, whereas the cars cannot, still the general public have the right to use and travel upon the entire street, including that portion of it on which the car tracks are laid, and are in no sense to be treated as trespassers for so doing. Again, it says, with regard to this case, that the fact that the company had generally a superior right of way along its line at places other than at street crossings in no way tended to prove that the gripman in charge of the car at the time and place of the accident was not negligent, nor would that fact lessen the amount of care and diligence incumbent upon the company with respect to the welfare and safety of the party who brought this action or of other persons rightfully upon the public street.

Mr. Justice Magruder, dissenting, says that he does not agree to that part of the opinion which holds that "street cars have a superior right of way to the general travel on streets at places other than crossings." The public streets belong to the people, and the humblest teamster has as much right to travel thereon, or on any part thereof, as the cars of any street railway company. There is no such thing as a "right of way" in a public street vested in a street car company.

CONSTRUCTION AND VALIDITY OF STATUTE REQUIRING SCREENS FOR MOTORMEN IN WINTER.

State v. Whitaker (Mo.), 60 S. W. Rep. 1068. Feb. 12, 1901.

While it is obnoxious to verbal criticism, the supreme court of Missouri, division No. 2, nevertheless does not think inoperative for indefiniteness and uncertainty the act of 1897, entitled "An act requiring persons, associations and corporations, owning or operating street cars to provide for the well-being and protection of employes." Section 1 provides: "That every electric street car, other than trail cars, which are attached to motor cars, shall be provided during the months of November, December, January, February and March of each year, at the front end, with a screen composed of glass or other material which shall fully and completely protect the driver, motorman, gripman or other person stationed on such front end and guiding or directing said car from wind and storm." The court thinks that the act quite plainly imposes upon every electric car company or association of persons operating electric cars the duty of providing screens on their cars in the winter months named for the protection of their motormen, and such, it takes it, was the plain intent of the legislature. Or, as it states it in other words, the court thinks that the act obviously imposes upon the corporation or person owning or operating electric cars the duty of providing said cars with screens.

Then, having construed the first section to require the corporation, association, or person owning the car to equip it with the screen required by the act, the court thinks that the statute makes it penal for "any person" who owns or operates an electric railroad car to operate such cars without the screens required by the statute, and any agent or officer of any association or corporation operating or owning such cars who violates said act is also punishable under the act; and by such "agent or officer" is meant one whose duty it is to see said cars are provided with said screens before they are operated; not the motorman for whose protection the act was passed. The managing executive officers represent the corporation or association, and the law, the court continues, will presume they know whether the cars operated under their direction are provided as the statute requires, and hold them responsible for operating them without first complying with the statute. To this it adds that it is not necessary, in charging a misdemeanor like this, to aver that it was knowingly omitted.

Nor does the court thing the act unconstitutional on the ground that the title gives no indication of the character of the act itself. On the contrary, it holds the title both definite and broad enough to include the provisions of the act, all of which it holds were germane to the purpose expressed.

Neither does the court consider the act offensive to the provision of the state constitution which ordains that no local or special law shall be enacted "when a general law can be made applicable." It thinks that the legislature had the right to make the classification it did in making the act apply only to electric cars and for the protection of motormen thereon, and it not only justifies it when considered with reference to horse cars but with reference to cable cars as well, on which latter it is generally known that the gripman stands near the center of the car, in a box which protects the lower half of his body, and where he is protected by the roof of the car in rainy or snowy weather, while the motorman stands in front and is much more exposed to the cold and inclement weather of winter than is the gripman on the cable car.

This being a public prosecution by the state of an offense against the public, the court declares it difficult to discern the relevancy of the argument that this statute deprives the motormen on electric cars of their liberty of contract. It pronounces it a plain, just, and commendable police regulation, and adds that not only has the state a direct interest in the health of the motormen, but in the passengers, whose lives and limbs may be imperiled if the motormen are allowed to become benumbed from exposure. But the record here, it says, did not contain any facts upon which it could properly decide the effect of a waiver by a motorman of his right to the protection secured to him by the act.

The penalty imposed for a violation of the act of a fine of from

$25 to $100 for each day that any car belonging to or used by such person, association or corporation is permitted to remain unprovided with the screen required by section 1 the court does not think an imposition of a cruel and unusual punishment. The way to avoid the cruelty, it says, is to obey the law, and avoid these accumulated fines.

TAXATION OF PROPERTY AND FRANCHISE TOGETHER—IMMUNITY CONTRACT ASSIGNABLE.

Detroit Citizens' Street Railway Co. v. Common Council of City of Detroit (Mich.), 85 N. W. Rep. 96. Feb. 12, 1901.

The supreme court of Michigan holds that it may take judicial notice that a certain street railway has a large market value, much in excess of any amount that could be obtained for the same if it were to be dismantled, and its rails, cars, motors, wire, etc., sold separately. Then, the legislature having provided that the track should be assessed as personal property, it holds that this term should be construed to include not only the ties, spikes, rails and switches, but also the right to use the bed upon which they are placed. Nor does it agree with the contention that if a franchise—i. e., an intangible license to do an exceptional business—is not made taxable property by express statute, it cannot be taxed indirectly by associating it with tangible property, thereby increasing the valuation of the latter. It insists that property should be taxable at its cash value, whatever it may be that causes the value. In other words, whatever may be the rule as to the assessment of privileges in the abstract, not connected with tangible property, the court maintains that the latter may be assessed for what it is worth, without reference to the cause of such value, and without analysis to see if some intangible element of value does not enter into it, which should be eliminated upon the theory that intangible things are not taxable. For example, if the property of a street railway company is worth, and would bring, with the franchises that are inseparable from and necessarily go with it, somewhere from ten to fifteen million dollars, its owners, the court holds, have no right to expect it to be taxed on a basis of one and one-half million dollars. Whether the property is worth such a sum, is for the assessors and board of review to decide, and their determination cannot be disturbed, if regular, and not fraudulent. Moreover, the court holds that there is nothing to prevent property of this character from being assessed as a unit. It says that the practice of taxing the property and privilege together is nearly or quite uniform, and that the propriety of assessing such property as an entirety is well supported by authority. It does not deem it an insuperable obstacle to assessing the property as a unit that the street railway system consists of several power plants, situated at different places along the line, which extends through or into several taxing districts. But, it being lawful for the city to make a percentage contract, fixing the rate of city taxation which should be binding upon the city and be efficacious to relieve the street railway from paying its share of the general tax for city purposes, the court holds this immunity from taxation assignable with the property of the company, the statute permitting an assignment, and all rights resting in contract being included.

ABUTTERS MUST PUT UP WITH ANNOYANCE CAUSED BY INCREASED TRAFFIC.

O'Reilly v. Perkins (R. I.), 48 Atl. Rep. 6. Jan. 31, 1901.

The allegation of certain parties, who asked to have the erection of a brewery in a certain locality restrained, that the operation of the brewery or the business carried on there would result in the transportation over the tracks of the street railroad company of a largely increased quantity of merchandise the supreme court of Rhode Island says would be equally probable if the brewery were to be located anywhere on the line of the road miles away from the homes of the complainants. The company, if licensed to carry freight and passengers, must carry them in such quantities and numbers as increasing business population may demand. The additional annoyance to persons residing on the line of the road is clearly damnum absque injuria, or that kind of damage for which no action will lie.

LETTING SCREW IN FLOOR OF CAR WORK UP.

Collins Park & Belt Railroad Co. v. Ware (Ga.), 37 S. E. Rep. 975. Jan. 26, 1901.

The supreme court of Georgia affirms in this case a judgment for $1,000 damages in favor of a husband in an action brought on a petition wherein he alleged, in substance, that his wife, while a passenger on one of the company's cars, attempted to alight therefrom, and caught the heel of her shoe on a screw intended to fasten to the floor of the car the fender over the wheel, the screw in question having been negligently allowed to work up until it protruded for a half inch or an inch above the floor of the car; that she was, in consequence, thrown violently upon the ground and rocks of the street, and was severely and permanently injured; that the injury was not the result of any negligence on the part of his wife, but was due to the negligence of the company or its employes in leaving the screws in an unsafe condition, and in failing to keep the fenders of its car properly fastened down and confined to the floor.

MAY CONSTRUCT STREET RAILWAYS IN PART THROUGH PRIVATE LANDS.

Farnum & Haverhill & Andover Street Railway Co. (Mass.), 59 N. E. Rep. 755. Mar. 2, 1901.

The supreme judicial court of Massachusetts holds that a street railway company organized under the general laws of that commonwealth can build its tracks and run its cars over land acquired by purchase outside of the limits of the streets or highways. It says that undoubtedly street railways, under the Massachusetts statutes, are intended to be located and used in the public streets, and they cannot be operated without a location approved by the local authorities. A location through the public streets, connected in any place with a track running through private lands, will not be likely to be approved by the authorities unless the general arrangement of the course is such as the public convenience requires. But the court is of the opinion, as above intimated, that the statutes permit the construction of street railways in part through private lands acquired by purchase, if all other requirements are complied with.

CARE REQUIRED IN LOOKING AND LISTENING—WHERE A STREET COMES IN ON ONE SIDE ONLY.

Halliday v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 69 N. Y. Supp. 174. Mar. 8, 1901.

The law requires a person endeavoring to cross a street on which there are street railway tracks, the second appellate division of the supreme court of New York holds, to look and listen in accordance with the dictates of ordinary prudence, but does not require the guaranty of any specific result. Here, the crossing of the street was sought to be made at a point opposite the line of another street which ran into that street, but did not cross it. There was also evidence from which the jury could conclude that the motorman might reasonably anticipate that pedestrians would use the crossing, even though the street which ran in there on one side did not actually cross. These facts lead the court to remark that no case was cited to the effect that there was no obligation at such crossing to have the car under control, so that an accident could be averted in case some one stepped suddenly from behind wagons seen to obstruct the view of the crossing. However, the question of negligence on the part of the company, as well as that of contributory negligence on the part of the person injured, it holds was for the jury.

WAGES OF CONDUCTOR EXEMPT AS THOSE OF A "LABORER."

Stuart v. Poole (Ga.), 38 S. E. Rep. 41. Feb. 28, 1901.

A street railway conductor whose duties are of a character depending more upon a mere physical power to perform manual labor than upon the possession by him of mental skill or business capacity, involving the exercise of his intellectual faculties, and the greater portion of whose time is occupied in performing labor of the former, and not of the latter, kind, the supreme court of Georgia holds, is a "laborer," within the meaning of the Civil Code, and his wages as such are exempt from the process of garnishment. For example, such a one, the court holds here, is a conductor whose duties are to keep the car in general order; to couple and uncouple trail cars when used; to keep lights dusted off and in proper condition; to keep the guard rails of the car in proper position; to attend to the trolley and keep it in place; to keep the seats of the car turned; to help passengers on and off the car; to help put the car back on the track if it gets off, and to help remove all obstructions from the track; to change switches, when there are switches, but not to open or close frogs; to get off and flag every railroad crossing; to look out for accidents at the rear of the car; besides having with the motorman joint charge of the car, giving orders for starting and stopping, collecting fares and issuing transfers, and keeping schedules.

GREATER CARE REQUIRED TO KEEP STREETS IN REPAIR THAN IMPOSED ON CITIES.

Mahnke v. New Orleans City & Lake Railroad Co. (La.), 29 So. Rep. 52. Dec. 17, 1900.

Railway companies that, as part consideration for the acquisition of their franchises for running cars through the streets of cities, have bound themselves by contract to pave and keep in repair the streets between their rails, the supreme court of

Louisiana holds, are held by stricter rules to the performance of their duty than are the municipal corporations themselves in the performance of their own obligations in this respect to the general public.

ELECTRIC STREET CARS HAVE RIGHT OF WAY—DUTY TO LOOK JUST BEFORE CROSSING TRACK.

Burke v. Union Traction Co. (Pa.), 48 Atl. Rep. 470. Mar. 11, 1901.

Electric street railway companies, the supreme court of Pennsylvania says, have not the exclusive use of their tracks, but in their use their rights are superior to those of the traveling public, and their cars have the right of way. No one is warranted in assuming that if he first reaches the crossing he may go on, and that the whole duty of care and vigilance is then cast on the motorman. The duty to look for an approaching car is an absolute duty, and failure to do so is negligence per se, or of itself. This duty is not performed by looking when first entering on the street, but continues until the track is reached. When a person about to cross the track of a steam railroad has stopped, looked and listened, at an apparently proper place to see and hear, the question as to whether there was a second place where he should have stopped, if at all in doubt, is for the jury; but this question cannot arise in the crossing of the tracks of electric roads in cities, where the duty is to look just before crossing. In this case, the party suing checked his horse almost to a stop and looked as he reached the house line of the street, and afterwards gave no further attention to the cars. He drove on 32 feet, not quickly, to avoid danger, nor at an ordinary speed, but slowly, to allow a wagon to pass in front of him, and went directly in front of a moving car. If he had looked again after he was on the avenue, he would have seen what his witnesses saw—that a collision was inevitable. It was his duty to look again, and his disregard of this duty, the court adds, was properly held to prevent a recovery in this action against the company.

PASSENGERS NOT REQUIRED TO WATCH COURSE OF CAR.

Henry v. Grant Street Electric Railway Co. (Wash.), 64 Pac. Rep. 137. Mar. 11, 1901.

A passenger wishing to get off at a certain street notified the conductor thereof, and when the name of the street was called and the car was afterwards stopped got off. It was at night, and dark.

At the place where he was accustomed to get off there was a plank roadway 35 or 40 feet wide. Just beyond it the track turned rather abruptly. On this occasion, the car went perhaps 50 feet beyond the regular stopping place, to where there was no protection for passengers, and the track passed over a trestle. Besides, the conductor, knowing the passenger's ultimate destination, pointed out and said, "Right across." The result was that the first step he took he stumbled and fell, sustaining injuries for which he recovered a judgment for $4,000 damages. In affirming this, the supreme court of Washington holds that the company was guilty of negligence in passing the street where it was accustomed to discharge its passengers, and discharging the passenger in such a dangerous place, and that he was not guilty of contributory negligence in not noting, under the circumstances, the dangers surrounding the place where he alighted, and by caution protecting himself against such dangers. With regard to the suggestion that, being familiar with the locality, if he had used ordinary care for his own safety and noted the turning of the car he would have known that it has passed the street, the court says that it does not think the law calls upon a passenger to watch the course of a car, or to notice in what direction it is going. He has a right to rely upon the conductor's putting him off where he directs him to. It would simply be impracticable, it declares, for passengers on a street car to rely upon their own observations, especially upon a dark night.

CONDUCTOR STRIKING TREE WHILE STEPPING AROUND SUPERINTENDENT ON RUNNING BOARD.

Hall v. Wakefield & Stoneham Street Railway Co. (Mass.), 59 N. E. Rep. 668. Feb. 27, 1901.

A conductor going forward on the left-hand running board of an open car to collect fares and to distribute transfers was injured by striking a tree while stepping around a superintendent of the company, who was a large man and was standing on the running board. This tree was thirty-one inches from the body of the car, and eighteen and one-fourth inches from the outer edge of the running board. On the other side of the car were the poles, so near the car that no one was allowed on the running board on that side. The supreme judicial court of Massachusetts overrules exceptions to a verdict ordered for the company.

With regard to the contention that the company had failed to provide the conductor a safe place by reason of building the track too near the tree the court says that it was to be observed that the location of the road where the accident happened was not under the company's control, but was determined by the selectmen and road commissioners of the town, and that, so far as appeared, the company had no right to remove the tree. Then, it was suggested that the company should have put its poles on the same side as the tree. But if such a suggestion was open and had anything in it, the court says that the short answer was that the presence of the tree was a permanent condition of the employment, and that the conductor, who had been in the company's service for some time, knew of the tree and took the risk of the danger from it, on the principle made familiar by many decisions.

As to an effort to fasten liability on the company on account of the alleged negligence of the superintendent, the court states that it was to be observed that so far as the presence of a passenger on the running board enhanced the danger, that was a part of the risk which the conductor assumed. The possibility of such presence there was one of the obvious and permanent incidents of the business. Of course the presence was known to the conductor. However, the facts relied on to take the case out of the general rule were that this particular passenger happened to be a superintendent and that there were seats in the car so that he might have left the running board clear. But the court says that if the superintendent was superintending at the time, to the extent of having an eye on the way in which the car was managed, his superintendence as such did not contribute to the injury. And, apart from this, it declares, it is hard to see how it mattered to the company's liability who the particular person on the running board was.

DUTY OF KEEPING PAVEMENT IN REPAIR IMPERATIVE.

Doyle v. City of New York (N. Y. Sup.), 69 N. Y. Supp. 120. Mar. 8, 1901.

A street railway company obtained the franchise to lay its tracks, upon a covenant reading: "The pavement to be kept in thorough repair by the said company within the tracks, and three feet each side thereof, with the best waterstone, under the direction of such competent authority as the common council may designate." The point was sought to be made that the covenant was only to repair the street with waterstone, because the street was paved with that material when the contract was made; that, as subsequently the street was paved with granite pavement, it must be assumed that the city did the work; and that, as the city changed from cobblestone to granite, the duty of the company to repair at all was abrogated. But not so thinks the second appellate division of the supreme court of New York. It says that the primary feature of the company's covenant was that it would keep the pavement between the tracks "in thorough repair." The method of doing it and the material were secondary and incidental. It made no difference how the street was paved at the time of the contract, or whether a different pavement was subsequently laid by the city. The duty of the company was clear and positive. It was to keep the pavement between the tracks "in thorough repair." The company might use waterstone or any other material to perform its duty, but the duty to keep in repair was imperative and emphatic.

Then, the court quotes part of section 98 of the railroad law which requires that every street surface railroad corporation so long as it shall continue to use any of its tracks in any street shall have and keep in repair that portion of such street between its tracks, the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe. This requirement the court holds well within the power of the legislature, even though the statute was enacted after the company obtained its franchise. The requirement that the work of keeping the pavement in permanent repair, "under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe," the court holds, does not relieve the company from making repairs until ordered so to do by the local authorities. That provision, it says, is for the benefit and protection of the city, and the company cannot shelter itself against its positive duty behind the failure of the city to order or supervise the repairs; for, as before stated, the primary duty of keeping the pavement is, both by contract and statute, devolved upon the company.

AGREEMENT NOT TO REQUIRE TRACKS MOVED IS NOT BINDING.

Macon Consolidated Street Railroad Co. v. Mayor and Council of City of Macon (Ga.), 38 S. E. Rep. 60. Feb. 26, 1901.

Every municipal regulation which does not amount to a deprivation or impairment of the franchise of a street railroad company, the supreme court of Georgia says, it will be upheld, unless it is unreasonable and arbitrary. The discretion of the municipal authorities as to these matters is very broad, and it will not be interfered with save in the case just mentioned. Is a regulation by a city requiring a street railroad company to remove its tracks from one part of a street to another a legitimate exercise of its legislative power? The court thinks it is, provided the proposed change is not arbitrarily and capriciously required by the city, but is really necessary for the convenience and welfare of the public. The municipal authorities must necessarily, in the exercise of their discretion, be left to determine the necessity and propriety of the proposed change. The courts will not readily interfere with the governing authorities of a city in the performance of a discretionary act. It is only where it has passed the boundary of legislative and judicial discretion, and is exercising the municipal power arbitrarily to the injury and oppression of the citizen, that judicial interference will be justified.

More than this, the court holds that the municipal authorities cannot make a binding contract, in effect, that they will not in the future, no matter how much the public convenience or safety may demand it, attempt to regulate the location of the tracks in a certain street. And, a city having no power to make a contract whereby it surrenders its power to require a company's street railway tracks to be moved from one part of the street to another whenever such removal is necessary for the public welfare, such an agreement made by the city, the court holds, cannot be used as the foundation for an estoppel to prevent the city from exercising its discretionary power to require such a change to be made. The mayor and council are the representatives of the public, and are placed in power to conserve the interests of the public. They are, for this purpose, invested with certain governmental and legislative duties, and these cannot be bargained away. Hence, they have no power, the court holds in this case, to bind the city by an agreement that if the company will cease, for example, to use a switch connected with its line and construct a certain kind of turnout on the opposite side of the street, it will not be required to change the location of its tracks from the side to the center of the street.

INJURY OF HEAVY WOMAN ALIGHTING AT TRANSFER PLACE WITH CONDUCTOR INSIDE CROWDED CAR.

Jacobs v. West End Street Railway Co. (Mass.), 59 N. E. Rep. 639. Mar. 1, 1901.

This the supreme judicial court of Massachusetts says was an exceedingly close case. On the one hand, as street cars are run, it is not negligence, it holds, to take on passengers when all the seats are occupied, when there is no more standing room in the passage-way of the car, and the new passengers have to stand on the platforms, and even on the steps. Furthermore, a passenger takes the risks incident to the mode of travel he chooses to adopt; as, for example, the risk of being injured in the removal of an objectionable passenger from a crowded car.

On the other hand, it has been held, the court continues, that a street railway company may be held liable for negligence if it allows its car to be so crowded with passengers that one of them is crowded off a platform while the car is proceeding on its way. It has also been held that the duty which a street railway owes to its passengers is not terminated until the passenger has alighted from the car, and covers the time during which the passenger is getting off. And, lastly, it may be that, if an aged woman passenger is pushed off the step by the turbulent behavior of the crowd behind her while she is alighting from the front platform under the very eyes of the motorman, there is evidence of negligence for the jury; and so, also, when the passenger is jostled by incoming passengers.

In this case there was no evidence that the injury which the passenger suffered was caused by any defect in the platform, but it appeared that it was caused by her tripping over "something" while she was on the rear platform on her way to the street. There was evidence that the crowd on the platform made it "impossible" for her "to get at and use the iron rail at the rear of the car" to steady herself as she was getting off; and it appeared "that the conductor was inside of the car"—"in the middle of the car"—while she was alighting.

It may be conceded in this case, the court says, that it is the duty of a conductor who is on the rear platform when a passenger is alighting to see to it that the passenger has an opportunity to alight with safety, and that it is his duty to see to it that passengers who are blocking the exit shall stand aside, or even alight from the car temporarily. Passengers who choose to take passage on a car which is so crowded that they have to stand on the platform or on the steps, and who thereby block the exit from the car, assume all inconveniences incident thereto, including that of temporarily alighting, when necessary, to allow a proper exit for passengers who wish to get off. It also may be conceded that the conductor's duty requires him, when not otherwise engaged, to be on the rear platform.

But a conductor has duties to perform which take him away from the rear platform, and, the greater the number of passengers, the longer the time during which it is necessary for him to be absent, and properly absent, from it. The duty of collecting tickets, for example, being one which cannot always be postponed, is a duty which, in a crowded car requires the conductor to be absent from the platform a good deal, and for some length of time; and, if a passenger wishes to alight while the conductor is so engaged, the inconvenience which she may endure in having to alight without his aid is one of those inconveniences which the passenger assumes by choosing to travel on a street car at a time of day when it is notorious that such conveyances are crowded.

There was no evidence in this case that the conductor was negligent in being absent from the rear platform when this passenger was alighting, and, the court says, unless she was entitled to go to the jury on the ground that the company should provide some one in addition to the conductor and motorman to care for the car and its passengers, there was no evidence of negligence in this case. As street cars are run, however, the court does not think that the omission to employ a third person could be found to be negligence.

The fact that the place where the passenger was getting off was a place where passengers were transferred to other lines, the court holds, made no difference. No distinction can be drawn between the duties devolving upon a street railway company when stopping at such a place for passengers to alight and those which they have when they stop at other places.

Neither does the court think that the fact that the passenger weighed over 200 pounds made a difference. The mere fact that a woman weighs over 200 pounds cannot, it says, make it the duty of the conductor to drop all other duties, and help her get off.

Neither was it material, in the court's opinion, that there was evidence that there were passengers "trying to get on as the passengers were alighting from the car," and "that there was a scuffle; a regular scuffle." There was no evidence that the woman was jostled by anybody.

For these reasons the court is of the opinion that there was no evidence on which the jury could find that the company was negligent, and it overrules exceptions to a judgment in the company's favor.

EJECTION OUTSIDE OF CITY OF INTOXICATED OR ILL PASSENGER WHO HAS NOT PAID FARE.

Hudson v. Lynn & Boston Railroad Co. (Mass.), 59 N. E. Rep. 647. Feb. 28, 1901.

The evidence in this case tended to show that a man taking an out-bound electric car in the night said as he paid his first fare that when he paid his next fare he would want a certain transfer. His second fare became payable as the car was passing over some marshes. When the conductor came to collect the second fare the man was sitting up asleep, having begun shortly after paying his first fare to act in a manner which would justify the conclusion that he was intoxicated, after which he fell asleep or into a stupor. Then, the conductor, after shaking him several times and failing to awaken him, stopped the car and put him off. The night was dark and rainy. There were no sidewalks and no buildings or shelter in the vicinity. About half an hour after being put off the car the man was ground upon the track, and was run over and killed by another car.

The supreme judicial court of Massachusetts is of the opinion that the man ceased to be a passenger when ejected from the car. Two things, it says, had occurred to give the company a right to terminate his relation as a passenger. The first was his conduct, which, whether in fact due to intoxication, to the effect of a drug, or to illness from some other cause, was such as to justify an inference that it was due to intoxication, and to found a just apprehension that unless he should be ejected it might result in acts of impropriety, rudeness, or disturbance on his part. The conductor was not bound to wait until some act of this kind had been committed, but could expel the passenger in order to prevent such misconduct as was to be apprehended from a person in his apparent condition.

The other circumstance which gave the company a right to eject him was the fact that he had not, upon demand, paid the fare for that part of his journey then being made. Section 197 of chapter 112 of the Public Statutes of Massachusetts, which is the law regulating the rights of passengers upon street railways in this respect, provides that "whosoever does not upon demand first pay such toll or fare shall not be entitled to be transported for any distance, and may be ejected from a street railway car." No doubt this was enacted before the introduction of electric cars, and when most street cars ran on streets where it would be safe to leave a passenger at any time. But the provision remains unchanged, and, the court holds, governs wherever the railway may be located. Therefore, by the terms of the statute, this man having not paid his fare upon demand, he was not thereafter entitled to be transported for any distance, and might be ejected from the car. This having been done, even if in an improper manner, his status as a passenger was terminated, although he may have had a right of action for his damages, if the ejection was effected in a wrong manner.

And the court holds that it was not the due and proper care required of the company in the exercise of its right to eject a passenger whose conduct was improper, or who had not paid his fare upon demand.

CITY MAY MAKE CONSENT CONDITIONAL AND MAKE RUNNING OF MAIL AND EXPRESS CARS A MISDEMEANOR.

St. Louis & Meramec River Railroad Co. v. City of Kirkwood (Mo.), 60 S. W. Rep. 110. Dec. 18, 1900.

Section 20 of article 12 of the constituiton of Missouri of 1875 provides that no law shall be passed granting the right to construct and operate a street railroad without the consent of the local authorities. Section 2543 of the Revised Statutes of 1889, which is a part of the act under which the plaintiff company was incorporated, provides that nothing therein shall be construed to authorize the construction of any railroad in, upon or across any street or road without the assent of the proper city or county corporate authorities.

Now, it would be difficult, the full bench of the supreme court of Missouri thinks, to conceive of a more positive and unequivocal veto than that conferred upon the cities, towns, and villages of the state by the constitution, and it holds that when such power is given to cities and towns it is not limited to a mere yes or no, but they may impose such conditions upon their consent as they see fit. Again, it says that it is plain that the constitution and the statute referred to give the absolute power of consent to the city, and that it does not lie in the mouth of a company which has obtained this consent, to urge that a condition limiting it to a carriage of passengers is unreasonable. If so unreasonable as to make it void, the consent obtained upon that consideration, the court holds, is also void. In other words, as the consent in this case was given solely on such a condition, the court thinks it very clear that, if this condition was illegal, then the company was entirely without right in the streets. It was, however, entirely reasonable, it says, for the town authorities to grant the company the privilege of occupying its streets as a street railway for passengers, —a system which would cause little or no inconvenience to the traveling public, but, on the contrary, contribute to the comfort and convenience of its inhabitants,—and at the same time refuse its consent to a railroad carrying freight, which might block its highways, and amount in many instances to a practical monopoly of the streets. And it declares that it is clear that the company's acceptance of the condition imposed in the franchise granted it estopped it from grasping the benefits of that contract with one eager hand, while thrusting aside its burdens with the other.

Furthermore, while the company's charter gave it power "to take and convey persons and property * * * and receive compensation therefor," the court says that there was no absolute rule of law compelling it to exercise all of its powers at all times and all places. Then, it must be remembered, it says, that the state was not here complaining of nonuser of its chartered powers, but it was the company, which obtained this consent to use the streets by contracting to carry only passengers on its cars, and thus to deny it itself merely one of its powers.

Wherefore, the court thinks that the facts in evidence constituted the company, so far as the city was concerned, a street railway, with the right to transport passengers only, and that in operating mail and express cars it exceeded the consent granted by the city, and thus made itself amenable to prosecution for the violation of an ordinance of the city punishing companies for operating cars in the streets for purposes not authorized by their franchises granted by the city. The ordinance in question prohibited any street railway running or operating any car or cars upon or over any route, or for any purpose or use whatever, in the city, not authorized by the franchise granted to it by the town or city of Kirkwood, and made a violation thereof a misdemeanor punishable by a fine of not less than $95 nor more than $100, or by imprisonment for not less than two nor more than three months, or by both such fine and imprisonment. The ordinance, the court holds, was a valid exercise of the corporate authority of the city. It says that it was not void by reason of being so unreasonable that the court would declare it void. The exclusive control over its streets was given to the city, and after notifying the company that it was violating its franchise, and after the company ignored its demand to conform to its privilege, the ordinance was justified. A street railroad laid in the street without authority is a nuisance, and so is the operation of a railroad of any kind in a city without authority of law. As the ordinance only made that an offense which is everywhere regarded as a nuisance, it was in no sense in excess of the city's power.

It may be well to add, the court says, that, as the franchise granted by the town of Kirkwood to the company was simply "for the transportation of passengers," the grant must be construed in favor of the public and against the railroad company, and this enumeration excluded the transportation of freight.

EFFECT OF CONSENT OF ELECTORS—PAVING RIGHT OF WAY—SPECIAL ASSESSMENTS FOR—GRADING PART OF—PETITIONS IMMATERIAL—LIEN WHERE ROADS CONSOLIDATE—MORTGAGE RETAINS PRIORITY—SUMS DUE FOR PERMIT NOT A LIEN.

Lincoln Street Railway Co. v. City of Lincoln (Neb.), 84 N. W. Rep. 802. Jan. 4, 1901.

The supreme court of Nebraska holds that the provisions of the constitution and the statute of that state requiring the consent of a majority of the electors of a city before a street railway company is authorized to construct and operate a street railway in such city do not authorize the city to grant a charter to, or enter into a contract in respect thereto with, such company. The charter rights are derived from the state. By the ordinance under which the consent of a majority of the electors is secured, and the provisions of which obligate the company to construct its street railway within the time and in the manner stated, and make it subject to such regulations as may lawfully be established by ordinance, the company is privileged or permitted to enter upon the streets of the city for the purpose of constructing its tracks and to carry out the purposes of its organization, and it thereby derives no other or greater right than a privilege, license, or permission to enter upon the streets for such purpose. Its grant of corporate franchises or privileges is not determined by such ordinance, but by general law.

Now, under the provision first above referred to, an ordinance was adopted submitting to the electors the proposition of giving their consent to the construction and operation of a proposed street railway, in which ordinance it was provided that "said railway track shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets, and that it shall, when required, conform to the established grades of the streets as now or hereafter to be established when such streets are brought to grade; and further, said railway company shall be subject to all reasonable regulations in construction and use of said railway which may be imposed by ordinance." But, even assuming that such provisions became a part of the charter of the corporation, having the elements of a contract with respect thereto, the court holds that an exemption from special assessment was not created, and the legislature was not thereby prohibited from imposing a liability on the company to pave the part of the street occupied by its tracks in conformity with the improvement of the remainder of the street, or, in the event of its neglect or refusal so to do, to authorize the levy of special assessments or taxes against the property of such railway company for the costs and expenses necessary to pave such right of way to conform to the remainder of the street improvements. The right of the legislature to require street railway companies in cities of a certain class to do such paving, or in case of their failure or neglect to perform such duty, to authorize the municipal authorities to make such improvement, and, by the levy of a special assessment, charge the cost and expense thereof against such companies, which shall be a lien on their property, the court holds, is a reasonable exercise of the reserved power vested in the legislature. Nor does it consider that an act of this character will be special or class legislation because not applying to all street railways in cities of different classes throughout the state.

The court further holds that, as to a street railway company which is required to pave its right of way to conform to the remainder of a street improvement, it is immaterial whether or not the paving petitions had the required number of signatures. The authority to require the street railway company to pave its right of way does not depend upon the jurisdiction of the city council to establish paving districts and engage in the work of improving the streets therein by reason of the petition asking for such improvement, but on the statutory ground that when streets are improved by the city authorities it is incumbent upon street railways occupying parts of the streets to pave in conformity therewith the portion they occupy.

Where a city engages in the work of paving its streets, and, as a part of the general improvement, grading is done in order to accomplish the main object, the court holds that the cost of grading, being a part of the general improvement, is properly charged as being incidental to and a part of the work of paving, and that special assessments against a street railway company for the cost of paving its right of way may properly include the cost of grading, also; the grading being incidental and necessary to accomplish the main object of paving the street.

Where street improvements are made, and the cost of paving that portion of the same occupied by street railway companies is levied as special assessments against the property of several street railways as separate properties, and the different street railways are afterwards consolidated and merged into one property and operated as one street railway system, the old companies losing their individuality and identity, and the new company assuming the burdens and obligations of the constituent companies, the court holds that, as between the consolidated company and the municipal authorities levying such special assessment, the liens arising by reason of the several assessments against the different constituent companies and properties attach to the new property owned and operated by the substituted company as one property, in its entirety, and may be enforced by the sale of the property without dismemberment and separating it into fractional properties as it existed before consolidation.

Where, however, a mortgage was placed upon a street railway property, and afterwards another company, against which certain liens for taxes levied as special assessments existed, was consolidated with the mortgagor company, the court holds that the lien of the mortgage on the property covered thereby, without the consent of the mortgagee, could not be impaired by the agreements and acts of consolidation, and that the tax lien on the property consolidated and merged into the new company and with the property mortgaged could not be made prior to the mortgage lien on all the property after consolidation; that the tax and mortgage liens attached to the specific properties embraced in the levy and mortgage, respectively; and that the respective liens and their priority could be preserved unimpaired only by separating the different properties into their constituent parts as before consolidation, and awarding to each a lien according to priority.

But under an ordinance providing for the payment of certain sums by a street railway company in obtaining a permit to lay its tracks in streets already paved, and requiring that a bond be given as security for the discharge of the liability assumed, the court holds that there is no authority for making the sums due under the provisions of such ordinance a lien on the property of the street railway company, as in the cases of taxes levied as special assessments.

ATTACHING EXTENSION REQUIREMENTS TO RENEWAL ORDINANCE—ADVANTAGE OF OLD COMPANY AS BIDDER—DISCRETION AS TO DEPOSIT, PAVING AND OTHER CONDITIONS.

Johnson v. City of New Orleans (La.), 29 So. Rep. 355. Feb. 18, 1901.

The situation with regard to a certain franchise was this: A street railway company applied to the city several years in advance of the expiration of its existing franchise (but not longer than was customarily done by railroad companies) for a renewal thereof. It asked only for a renewal as to its existing lines. At once it was met by a demand for extensions as finally ordered. Members of the city council refused to introduce an ordinance looking to the renewal unless the extensions were embodied therein as part of the system. The people in the sections wanting the extensions took the matter up, and by public meetings and petitions made clamorous demand for the same. For months the matter was under consideration. The railroad company did not want and were not seeking the extensions. It was the city council, representing the people behind its members, who made the demand. By means of the extensions thoroughfares would be opened not only for reaching the homes of the people, their schools and churches, but for the fire engines, police patrol, etc. By tacking on to a valuable franchise, seeking renewal, the stipulation that the extensions should be constructed and operated as a part thereof, these thoroughfares could be obtained

The supreme court of Louisiana is of the opinion that the council could legally pursue this policy, and while its exercise may have resulted in some advantage to the owners of the old or existing franchise, in the matter of bidding at the sale, the court does not find that other bidders were shut out from competing Other persons or corporations could have put themselves in positions to have become competitors. The proposed extensions touched, crossed, or came in contact with the lines of other street railroad companies. The advantage to this one particular company was not of its seeking or connivance, and resulted merely from the situation it occupied as owner of the existing lines to which the extensions were attached. It was not, therefore, the court holds, an illegal advantage. No fraud or undue influence was shown, and, as far as the city was concerned, its rights, the court points out, were protected against the consequences of a bid too low in amount; for its guardians had the rights reserved to reject any and all bids. Hence, the court thinks that there was, in the matter of such sale, a sufficient compliance with the requirements of the city charter that the sale of a street railway franchise must be publicly offered and adjudicated to the highest bidder. In short, it holds that the sale of a franchise at public auction is not illegal because it happens that one purchaser, without his or its connivance or procurement, and without fraud, collusion, or undue influence being shown, is in a position, by reason of his or its situation, to bid a price higher than another.

Again, the court says that while the present charter directs the granting or renewal of street railway franchises to be offered to the highest bidder at public sale, there is nothing in the charter, and nothing intended thereby, prohibiting the city council from looking after and securing the extension of street car facilities in parts of the city needing the same, by attaching franchises therefor to existing franchises coming up for sale in renewal, and selling the same in block as continuous lines, forming a complete system, with one fare over the whole. This, it holds, is in the interest of the public—in the interest of the development of the city. The true policy of the city is as much to be found in promoting such extensions as it is in looking after the pecuniary considerations incident to the sale of such franchises.

With regard to the amount of money required to be deposited by bidders, to protect the city and to enforce compliance with the obligations of the contract, the court holds that the same was within the just discretion of the council, and the court, it says, will not interfere therewith. The same is true with regard to the stipulation that the purchaser of the franchise should be required to keep in good order and repair, and to pave and repave when required, the portions of streets occupied by the railway tracks, and the other stipulation that a purchaser, other than the owner of the existing franchise, should relieve the city of its obligation to take at its valuation the rolling stock, equipment, fixtures, etc., of the company operating the existing lines.

PRESUMPTION AS TO ACCIDENT FROM STRANDING OF CABLE—FAILURE TO CALL WATCHER AS WITNESS—EXCLUSION OF REPORTS.

Smith v. Metropolitan Street Railway Co. (N. Y. Sup.), 69 N. Y. Supp. 176. Mar 8, 1901.

In affirming a judgment for damages for injuries to a passenger caused by a collision of cars which was caused by the stranding of the cable at a point where it had been spliced eight days before, the second appellate division of the supreme court of New York holds that the presumption of negligence arising from the happening of the accident was not completely overcome by evidence which established the fact that the cable was the best in use; that a system of constant inspection was in operation; and that the defect in the cable which caused the accident was not discovered in time to prevent the occurrence; but holds that the case was properly submitted to the jury, and that a nonsuit would have been error. It also makes a point of the failure to produce as a witness one of the watchers on duty at the power house the afternoon that the accident occurred who was in the city at the time of the trial, the other watcher being out of the state. Nor does it think that it was reversible error, under the circumstances, that their written reports were excluded, as it says that it was evident that nothing contained in them could affect the determination of the question of the care with which the splice was made, or that of the credibility of the witnesses in regard to it.

AWARD OF $250 DAMAGES FOR WRONGFUL EJECTION OF PASSENGER REDUCED TO $100.

Conlon v. Metropolitan Street Railway Co. (N. Y. City Ct.), 69 N. Y. Supp. 653. Mar 26, 1901.

Although it holds that a passenger wrongfully ejected by a conductor for a refusal to pay fare after tendering a transfer ticket may be awarded compensatory damages for the technical assault involved in the conductor laying his hands on him and telling him that unless he got off he would be pulled off, as well as for the indignity, the humiliation, and injury to his feelings caused thereby, nevertheless the general term of the city court of New York thinks a verdict for $250 excessive, and that $100 would be a fair, reasonable, and a just compensation for the damages sustained.

NO RIGHT TO THROW INTENDING PASSENGER FROM MOVING CAR FOR MANNER OF BOARDING IT.

Hart. v. Metropolitan Street Railway Co. (N. Y. Sup.), 69 N. Supp. 906. Apr. 22, 1901.

Here, according to the evidence in his behalf, an intending passenger, who had safely boarded the front platform of a car while in motion, was seized by the gripman, and thrown from the moving car into the street Being upon the car as a passenger, the appellate term of the supreme court of New York holds, he was entitled to protection from an assault by the employe in charge thereof, whatever the motive of the assault; and if he was not entitled to remain on the car, through some infraction of the reasonable rules of the company, he was subject to removal by the use of no more than reasonable force, if he refused to leave voluntarily. If it be assumed (for there was no proof) that the company's rules prohibited an entrance by way of the front platform, in this instance not obstructed by a gate, he might possibly have been refused passage, but no rule of law required him to take his instructions of the company's rules at the risk of his life. Then, the court says that it certainly cannot hold that his recovery of damages was prohibited by his having boarded the car while in motion. If this had contributed to the situation which resulted in his injury, as a proximate cause, there would be no doubt that his case must fail; but he placed himself in a position of safety, so far, at least as the movement of the car had any bearing upon his injury, and, while his act may have contributed to the fury of the gripman, it was not contributory negligence.

MEASURE OF DAMAGES FOR BREACH OF CONTRACT TO BUILD EXTENSION TO BENEFIT LAND.

Belt v. Washington Water Power Co. (Wash.), 64 Pac. Rep. 525. Mar. 30, 1901.

For breach of contract to construct and operate an extension of a street railway, where the party to the contract suing therefor was the owner of a large amount of real estate suitable for and only for suburban residences, which was laid off in lots, blocks, streets, and alleys, and duly dedicated, and it was for the purpose of benefiting these lots, and increasing their value, and making them available as city property, that the contract in question was entered into, as was known by the company charged with the breach of contract in failing to construct and operate such extension as agreed, the supreme court of Washington holds that the proper measure of damages was the difference between the value of the land if the contract had been carried out and its value with the contract unfulfilled.

STATEMENT OF MOTORMAN SHORTLY AFTER ACCIDENT EXCLUDED—AUTHORIZATION OF SPECIAL RATE OF SPEED IS VALID.

Ruschenberg v. Southern Electric Railroad Co. (Mo.), 61 S. W. Rep. 626.

A witness was here asked if, after he reached the car, he heard the motorman make any statement as to the cause of the accident in this case, while the motorman was standing on the street, having left the car to assist in extricating from the wheels the body of the boy killed. The supreme court of Missouri, division No. 2, holds that there was no error in sustaining an objection to this question. It holds that any statement the motorman might have made at the time indicated was incompetent as an admission of the company. The statement called for was incompetent as a part of the res gestae, or essential circumstances of the accident. On its face, it sought to elicit a narrative of a past event. It was not pretended that it was an exclamation or statement characterizing the conduct of the motorman pending the accident. So, as applied to this case, the court considers that the offer was to prove a narrative of a past occurrence, and not a circumstance so connected with the main fact as to characterize the act itself.

Another thing that the court holds is that, where there is a provision in a city charter which declares invalid any ordinance inconsistent with a prior general ordinance, unless such prior ordinance or the conflicting parts thereof be repealed in express terms, and there is a general ordinance providing that no car shall be drawn at a greater speed than a certain specified number of miles per hour, a subsequent ordinance granting a franchise for a street railway which contains a clause permitting cars to be run at a greater speed must be taken to constitute an exception to the general act or provision, and not a repeal, and is not invalid.

LIABILITY FOR INJURY OF PASSENGER CAUSED BY COLLISION WITH PAVING STONE.

Dusenbury v. North Hudson County Railway Co. (N. J. Sup.), 48 Atl. Rep. 520. Feb. 27, 1901.

In this case a passenger was badly injured by having a trolley car on which she was riding derailed and so suddenly brought to a stop that the car windows were broken, the stove was overturned, the rear end of the car was smashed in, and she was violently thrown from her seat to the floor. On the part of the company, it was shown that derailment and sudden stoppage of the car were due to the fact that it had struck a loose paving block, which was lying between the rails, and was wholly or partially covered by snow and slush. Such being the case, the supreme court of New Jersey holds that it was for the jury, not the court, to determine whether the presence of the paving stone might not have been discovered, and the accident avoided, by the exercise of that high degree of care which the law imposes upon common carriers for the safety of their passengers. It holds that by the evidence offered on the part of the passenger a prima facie case was made out against the company. The mere happening of the accident in the absence of explanation of the cause of its occurrence, justified the inference that it was due to some negligence on the part of the company. At the close of the passenger's case, therefore, the burden rested upon the company of proving that the accident was not the result of lack of care on its part. The company and its employes were charged with the exercise of a high degree of care for the safety of this passenger upon its car, and its liability depended upon whether the motorman who was running the car would have detected the presence of the paving stone if he had used that great care which the law imposed upon him; and, if he would have discovered it, then whether the presence of the stone should have suggested to him the danger of an accident, such as that which it brought about, in case the car was attempted to be run over it. These were clearly questions which should have been submitted to the jury, rather than answered by the court.

LIABILITY FOR COLLISION DUE TO NEGLIGENCE OF EMPLOYES OF CONTRACTORS IN OPERATING SIGNALS.

Ortlip v. Philadelphia & West Chester Traction Co. (Pa.), 48 Atl. Rep. 497. Mar. 25, 1901.

A motorman employed on a single track electric railway was injured in a collision between his car and a car owned and operated by contractors who were engaged in ballasting the roadbed with broken stones. The road was operated by a block system, with electric signals, which were set by the men in charge of the cars, and the collision resulted from the failure of the contractors' workmen properly to adjust a signal after entering a block. The traction company denied liability on three grounds: (1) That it was not responsible for the negligence of independent contractors; (2) that it was not negligent in intrusting the operation of its signals to the employes of its contractors; (3) that the motorman, by remaining in its service with knowledge of the manner in which the signals were operated, assumed the risk of injury from that cause. But the supreme court of Pennsylvania affirms a judgment in favor of the motorman. It holds that it was unnecessary to determine whether the contract was an independent one, or whether the company could absolve itself from liability in regard to so vital a matter as the operation of its signals, by delegating it to its contractors. The contract related to the construction of the roadbed, and, if independent, it was so only as to the doing of that work. The operation of the signals was not, as an independent matter, intrusted to any one, but remained in the charge of the company. The use of the tracks was under the direct control of the company's superintendent, who retained and exercised the right to direct the management of the cars and signals. In all matters incident to the use of the track, the contractors and their workmen represented the will of the company, and its responsibility remained. The motorman could not be charged with contributory negligence in remaining in the service of the company after the contractors were allowed to use its track. The ordinary risk of his employment was slightly increased, as it would have been if more passenger cars had been used, but the additional use of the track presented no obvious danger.

CONSENTS—NATURE OF—JURISDICTION VESTED BY NOT AFFECTED BY WITHDRAWAL, SALE OF LAND, LAPSE OF TIME—BOARD OF EDUCATION CANNOT GIVE—AS TO WHAT PROPERTY MAY BE GIVEN—EFFECT UPON OF UNAUTHORIZED RESTRICTION—LOCATION OF A ROUTE.

State (Currie, Prosecutor) v. Atlantic City (N. J. Sup.), 48 Atl. Rep. 615. Feb. 25, 1901.

The supreme court of New Jersey holds that the "consents in writing of the owners of at least one-half in amount of property," fronting upon a street railway route, required by "An act to regulate the construction and maintenance of street railroads in this state," approved May 16, 1894, and by "An act to regulate the construction, operation and maintenance of street railroads in this state," approved April 21, 1896, are not licenses or concessions granting to the railway company some interest in land or right in the streets. They are, in effect, votes for the adoption of a legislative scheme by which a special jurisdiction over highways is conferred upon the governing body of the municipality.

The court further holds that there can be no effective withdrawal of any consent after jurisdiction has vested in the municipal body. Jurisdiction that has vested in the manner prescribed by the legislature will not be ousted by the subsequent conveyance by an owner of the property, by virtue of the ownership of which he had consented to such jurisdiction. Jurisdiction that is acquired over a special subject is not exhausted by lapse of time, or by ineffectual exercises of it.

A board of education, nothing more appearing, cannot give a valid "consent" with respect to a schoolhouse lot for the statutory purpose in question.

When the beginning point of a proposed street railway route is to the north of a natural boundary that bisects an owner's property, such owner can give a valid consent with respect to so much only of his property as lies to the north of such boundary. A consent based upon the ownership of property fronting upon a street over which permission is desired is limited to such street, and has no application to any street upon which the property does not front.

The court leaves as a quaere: As to the effect upon an otherwise valid consent of an unauthorized restriction upon the exericse of the jurisdiction conferred.

"Location of a route," in a statute, implies, the court holds, the right to construct and operate a railway upon such route, if that was its meaning at the time it was used in the legislative act.

RESPONSIBILITY FOR UNAUTHORIZED UNLAWFUL ACTS OF WITNESS SEEKER.

Nowack v. Metropolitan Street Railway Co. (N. Y.), 60 N. E. Rep. 32. Apr. 16, 1901.

The court of appeals of New York says that if an honest man by mistake employs a dishonest one to look up witnesses for him, and the latter, through excess of zeal, resorts to bribery, although it was never thought of by his employer, it is better, for cleanliness and purity in the administration of justice, that the facts should be known, with the fullest opportunity for explanation, than to exclude all evidence of the evil acts upon the ground that they were not authorized, because authority may properly be inferred from the nature of the employment. And it holds that evidence of attempted bribery that would be admissible against an individual employing a man to look up witnesses is admissible against a corporation employing one under similar circumstances. It does not consider that such evidence is inadmissible against a corporation without proof of some corporate act expressly authorizing the agent to tamper with witnesses. A corporation, it says, can act only through agents, and where a branch of its business, whether broad or narrow, is intrusted to an agent, without any restriction, whatever he does which directly relates to that part of the corporate business, and tends to promote it, is binding upon the corporation. Having authority to accomplish a certain result, with no limitation as to the means to be employed, his acts, so far as they directly contribute to that result, even if unlawful, are corporate acts. They are done for the corporation by an agent clothed with general authority to effect a certain purpose, which they aid in attaining. Any admission made by him through acts done to carry on his branch of the business, and which reasonably tend to advance it, is regarded in law as made by the corporate body which authorized him to act for it with reference to the subject of his employment. So, if a man is employed to find witnesses, if possible, who will swear to such a state of facts as will prevent a recovery, and the method of doing this is left to his judgment and discretion, if he adopts a method not contemplated by the company, still it will be responsible for what he does, in the line of his employment, to promote its interest, and his acts will have the effect of an admission that its case is weak and of casting doubt on the testimony of other witnesses looked up by him and sworn by the company.

PAYMENT OF WITNESSES IN EXCESS OF LEGAL FEES.

Green v. Metropolitan Street Railway Co. (N. Y. Sup.), 70 N. Y. Supp. 123. Apr. 29, 1901.

Whenever a witness has been paid money in excess of the legal fees, that fact, in and of itself, the first appellate division of the supreme court of New York holds, is always a proper subject to be considered by the jury as bearing upon his credibility; that is, whether the testimony of such witness is induced by the increased or additional payment.

NO INJUNCTION BEFORE DECISION ON VALIDITY OF STATUTE GIVING SCHOOL CHILDREN HALF FARES.

Ahern v. Newton & Boston Street Railway Co. (U. S. C. C.), 105 Fed. Rep. 702. Dec. 13, 1900.

The United States circuit court, in Massachusetts, says of the state statute which requires streeet railway companies to transport scholars of the public schools to and from the school houses and their homes at one-half the regular fare charged other passengers that, upon its face, the statute seems open to the objection of unreasonably reducing the rates charged by railroad companies, and to the further objection of discriminating in favor of a particular class in the community. An act open to either of these objections has been held by the supreme court to be in violation of the fourteenth amendment to the constitution of the United States. But, notwithstanding that the circuit court has grave doubts of the constitutionality of the act referred to, it holds that a preliminary injunction should not be granted againsht the carrying out of the statute, an important constitutionnal question being raised, and the plaintiff not having shown that either the stockholders or the railway corporation would suffer irreparable injury before a final hearing could be had in the case.

CABLE SLOT 1½ TO 2 INCHES WIDE A NUISANCE.

Brown v. Metropolitan Street Railway Co. (N. Y. Sup.), 70 N. Y. Supp. 40. Apr. 29, 1901.

Where the usual width of the slot between the tracks of a cable railway is from five-eighths to three-fourths of an inch, which it may be inferred does not render the slot unsafe, the first appellate division of the supreme court of New York holds that where the slot at a particular place is from one and a half to two inches wide, and people riding bicycles have had the wheels go through it, a jury is warranted in finding the slot to be unnecessarily wide, and therefore that the authority granted to make this excavation in the highway has not been pursued with proper care, and that, consequently, as the authority has not been properly used, the company has created a nuisance.

JOLT COMMON KNOWLEDGE.

Whitcomb v. Detroit Electric Railway Co. (Mich.), 84 N. W. Rep. 1072. Jan. 29, 1901.

The evidence must be very clear, the supreme court of Michigan says, which would make a company responsible for such a dangerous method of operating a disabled electric car as having the conductor stand upon the top of it and attempt to hold the trolley pole against the wire. A rule requiring such conduct, it declared, would shock the common sense of the average man. If conductors are in the habit of so doing, a rule against it, the court adds, would be very proper for such companies to adopt.

The sudden jolt given a car when it reaches a curve, the court holds, is common knowledge.

EXTRAORDINARY DILIGENCE REQUIRED IN THE CONSTRUCTION AND MAINTENANCE OF TRACKS.

Macon Consolidated Street Railroad Co. v. Barnes (Ga.), 38 S. E. Rep. 756. Apr. 24, 1901.

Nothing can be more free from doubt or question, the supreme court of Georgia says, than the proposition that railway companies are bound to exercise extraordinary diligence in protecting their passengers from injury. It is not logical or sound to say that this requirement can be met by managing with such diligence cars upon a track built or kept up with diligence of a less degree. The track is just as essential a thing in the transportation of passengers by rail as is the car in which they ride. A railway car cannot be successfully or safely run except upon a track, and a railway company cannot lawfully, either as to car or track, be wanting in extraordinary diligence toward passengers without becoming responsible in law for the consequences. So the court holds that the rule of law requiring railway companies to exercise extraordinary diligence in protecting their passengers from injury applies as well to the construction and maintenance of tracks as to the operation of cars thereon. Continuing, it says that the rule of extraordinary diligence is fixed and unvarying. It requires the observance of that extreme degree of care and caution which very prudent and thoughtful persons exercise in and about any given matter. What does or does not amount to extraordinary diligence varies with circumstances. For instance, in larger towns, or in cities, or with more dangerous motive power, greater strength of materials and more care in construction would be necessary than in a town of 3,000 inhabitants where it was designed to operate cars by horse power at a correspondingly limited rate of speed. In any given instance, the test would be: Does this road, in view of all the circumstances and surroundings, come up to what very prudent and thoughtful persons would regard as essential to its safe operation?

STREET CARS CLASSED WITH HACK AND OMNIBUSSES AS TO PRIVILEGES AT DEPOT.

Ex parte Vance (Tex. Cr. App.), 62 S. W. Rep. 568. Apr. 17, 1901.

A city ordinance intended to establish omnibus and hack stands, as well as stands or stopping places on passing street car lines, near a depot, and to regulate the right to solicit employment for vehicles, hotels, etc., at and about said depot, which makes it unlawful for any driver of any omnibus, hack, carriage or other vehicle engaged in carrying goods or passengers for hire in the city to leave his vehicle and go anywhere along the walks and thoroughfares adjacent to the depot to solicit patronage for his conveyance, but as to motormen and conductors of street cars contains no such provision, the court of appeals of Texas holds clearly discriminates against hackmen, omnibuses, etc., and in favor of street car men, in their right to solicit patronage, and is unreasonable and on that account invalid. True, it says, these represent different characters of vehicles, but they belong to the same general class—that is, of carriers of passengers for hire; and there is more or less competition between them, so their rights as to the solicitation of custom should be equal. But the street car lines being fixtures, the court does not think that it is, in the absence of clear proof to the contrary, an unreasonable discrimination in their favor that the designated stopping places on them are nearer the depot than the hacks, etc., are permitted to stand.

ABUTTERS CANNOT ENJOIN OPERATION OF ROAD FOR INCONVENIENCE OF LOCATION.

Budd v. Camden Horse Railroad Co. (N. J. Ch.), 48 Atl. Rep. 1028. April 27, 1901.

A municipal corporation which is empowered by its charter to regulate its streets, and to prescribe the manner of their use by any person or corporation, the court of chancery of New Jersey holds, has exclusive power to determine in the first instance how the space within the bounds of the highway shall be appropriated to the varied uses of the highway. But a general ordinance prescribing a certain width of the sidewalk in avenues of a certain width is modified by a subsequent special ordinance making a different disposition of a particularly named avenue. And the court holds that a trolley railway track, laid in accordance with the direction of the special ordinance, will not be enjoined from operation because its location works inconvenience and injury to the abutting owners. If the municipality has so unreasonably appropriated the divisions of the highway as to work injury to the abutting owners, their remedy is not in equity, but in the courts of law, which supervise the action of inferior jurisdictions. A mandatory injunction will not be decreed where the legal rights of the complainants are disputed and unsettled, and where the acts complained of are adequately remediable in the courts of law.

RISKS ASSUMED BY WORKMEN IN REPLACING OLD STRUCTURE AT NIGHT BY ELECTRIC LIGHT.

Robare v. Seattle Traction Co. (Wash.), 64 Pac. Rep. 784. Apr. 13, 1901.

The work of repairing the track of a line of electric railway which was constructed upon piles where it crossed a lake, was carried on both by day and night, clusters of electric lights being used at night by the workmen to aid them in seeing the work. A common laborer on the night force, who knew of the general condition of the road and that the ties had been sawed off at stated intervals for the purpose of driving new piles, stepped upon a tie that had been more or less severed from the rest of the structure, which gave way, and precipitated him through the trestle. There was also testimony that the foreman had constantly warned the men of their danger, and notified them to look out, which it would seem that this man ought to have heard, although he testified that he did not hear it. The supreme court of Washington holds that a nonsuit should have granted at the close of his testimony, from which alone it says that it is forced to the conclusion that he did not exhibit that care and watchfulness which he should have done under the circumstances, that the danger was apparent, and that the company was, therefore, not responsible for the damages which ensued. It says that he must necessarily have known that the tearing down and building up of an old structure of this kind was a dangerous occupation, and that it was his duty to be careful under such conditions, whether he had heard the warning to be careful or not.

RIGHTS ON TRACKS AT OTHER PLACES THAN STREET INTERSECTIONS.

North Chicago Electric Railway Co. v. Peuser (Ill.), 60 N. E. Rep. 78. Apr. 18, 1901.

The supreme court of Illinois holds that it was error to refuse to give the following instruction: "The jury are instructed that by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, a street railway company is invested with the right of way over other vehicles over the portion of street occupied by its tracks, and it is the duty of the drivers of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same; and if the jury believe from the evidence that the plaintiff, while neglecting such duty and failing thereby to use ordinary care for his own safety, was injured, then he cannot recover in this case."

Street railway companies, the court says, are public carriers of passengers, and are given corporate existence to enable them to provide the means of rapid transportation for the convenience of the people and the promotion of the public welfare. The cars of such corporations cannot give and take the road,—turn to the right or to the left,—as can ordinary vehicles, but must move on and along the rails laid down in the street for that purpose. The grant to such corporation of the right to use the streets of a city must, by necessary implication, be held to confer the right of passage along its track superior to the right of a horseman or one driving a vehicle on that portion of the street occupied by the tracks of the railway company. Such companies do not, however, have an exclusive right to the use of that part of the streets occupied by their tracks. The public are not deprived of the right to use all parts of the street in the ordinary manner, but retain such right subject only to the superior right of passage, which, out of considerations of public convenience and the necessities of the case, must be yielded to the street cars on that portion of the street occupied by tracks of the railway. The citizen passing along a street in a carriage, buggy, or other like vehicle, subject to the rule he must exercise ordinary care for his own safety and not obstruct the passage of the car, may drive on the track or rails laid in the street by a street car company, and drive along and upon such track or rails without being a trespasser, but it is his duty to leave the track whenever his presence there serves to impede the passage of the cars. On the other hand, a street railway company is charged with the knowledge that the public may lawfully use the entire street, and it must, in operating its cars on the streets, employ all reasonable means to avoid injuring those whom it knows may rightfully use that part of the street occupied by its tracks.

The foregoing, the court says, applies only to other portions of the streets than street intersections, and the principles announced it says are supported by the consensus of modern authority.

RIGHTS AND DUTIES OF PERSONS DRIVING UPON OR DIAGONALLY TOWARDS TRACKS.

Armstead v. Mendenhall (Minn.), 85 N. W. Rep. 929. May 3, 1901.

According to the supreme court of Minnesota, a street car company operating cars upon public streets and other persons lawfully occupying such streets have rights alike, in the main. The cars cannot turn out, as can persons driving or walking, so that in this respect it may be said that the company has a paramount right over its tracks. Beyond that, the duties of the parties are reciprocal, and so are their rights. Except as before indicated, they are charged with the same measure of care and the same duties.

Further, the court holds that, if, in this case, the horse in question proceeded along the street 50 or 60 feet, gradually approaching the track, and thus indicating the driver's purpose to cross, it was the duty of the motorman, who saw both horse and wagon, upon his own admission, from the time they were within 300 feet, to have his car under control, and thus avoid a collision. The driver's prior negligence would not relieve the motorman from exercising an ordinary degree of care, or excuse the defendant company from liability in case of accident. In the operation of its car, defendant was bound to take notice of and respect the rights of the driver of any vehicle in the street. If by the speed of its cars it increased the risk of accident to those lawfully upon the streets, it was bound to enlarge commensurably the vigilance and care necessary to avoid the infliction of injuries made more imminent by such speed or management. The rule applied when the crossing is at steam-car tracks to both look and listen does not apply, as a hard and fast rule, to street railways; and the car should have been run in an ordinary manner, with some regard to the fact that streets are open to travelers upon foot or in wagons who may desire to cross the track. Acting upon this fact, the driver of the horse had the right to assume that the defendant's cars would not be run in an unusual way or carelessly.

CONSTRUCTION AND VALIDITY OF ACT MAKING TAXATION OF PROPERTY OF STREET RAILROADS "IN CITIES" THE SAME AS THAT OF OTHER RAILROAD PROPERTY.

State v. Metropolitan Street Railway Co. (Mo.), 61 S. W. Rep. 603. Feb. 19, 1901.

The supreme court of Missouri holds that, notwithstanding "An act to provide a more uniform assessment and taxation of street railroads in cities of this state," approved March 11, 1897, uses the words "in cities" in the title and text of the act, its provisions apply to the assessment and taxation of the property of a street railway company, not only when its line is located on "the public streets and thoroughfares" of a single city, but also when located on the public streets and thoroughfares of any city, one or more, "through or in which it is located," and also when its line may be extended on its "right of way" through or into "a municipal township not within the limits of such cities." The words "in cities," in the title, and in section 3 of the act, it holds, were evidently used as words of description, and ought not to have the effect of limiting the terms of the text as a whole.

The act being applicable to all street railroads existent in the state, the court holds that it is not obnoxious to the constitutional inhibitions of class legislation.

Prior to this enactment, the whole property of a street railroad was subject to assessment for taxes by the local authorities. The effect of this act in that respect was simply to change the assessing authority from them to the state board of equalization, and the court says that it knows of no reason why this might not have been done. But, it was then contended that, the whole of the company's property being assessed under this act in the manner that the distributable property of steam railroads is required to be assessed, the school taxes ought to have been levied thereon at the rate prescribed by the statute for that class of property of such railroads,—that is, at the average rate of the several school districts throughout the state,—instead of, as they were, at the rate levied upon other property in each district. And the court admits that there would be much force in this contention if it were not for the provision in the act that, "the said property returned to the state auditor as by the first section of this act required, shall be subject to taxation for state, county, municipal and other purposes to the same extent as the real and personal property of private persons." The only way, however, the court holds, that the company's property could be subjected to taxation for school purposes to the same extent as the property of private persons was by levying the same rate therefor on its property in each district as was levied upon the property of private persons.

CARE REQUIRED OF PASSENGER MEETING CONDUCTOR ON RUNNING BOARD.

Third Avenue Railroad Co. v. Barton (U. S. C. C. A.), 107 Fed. Rep. 215. Jan. 4, 1901.

A passenger got on the running board of open car somewhat back of the middle of the car, with a stanchion in each hand. The car started, and the conductor motioned him to come forward, calling out: "Seat in front, sir. Come forward here, and get the seat." The passenger moved forward along the running board, and the conductor at the same time moved toward the rear of the car on it. When they met, the passenger started to go around the conductor and came into violent contact with a pillar of an elevated railroad, of the location of the pillars of which he knew in a general way. He obtained a judgment for damages. This, however, the United States circuit court of appeals, second circuit, has reversed, ordering a new trial. There was an instruction given from which the jury might have inferred that, if the passenger were in a place of safety, and left it not voluntarily, or because of his own wish, but by reason of the invitation or summons of the conductor, in order to take a vacant seat, and while moving towards such vacant seat encountered the conductor, who insisted standing in such a position that he could only proceed by undertaking a manifestly perilous passage, it must find for him. But, in order to entitle him to recover under such circumstances, the court holds that it must be apparent upon the whole case that in undertaking such passage he acted as a man of ordinary prudence would have done. He was not physically thrust into peril. When he reached the conductor on the running board, he might fairly have insisted that the latter should step inside, or should retreat sufficiently far to uncover the entrance to the vacant seat, or should allow the passenger to pass inside of him. Certainly, he was under no obligation to proceed by passing on the outside of the conductor, and whether he acted with reasonable prudence in attempting to do so was a question which the company was entitled to have submitted to the jury, but which, under the charge, was practically withdrawn from its consideration. And the court thinks that it was error to refuse to give these instructions: "If you believe that the plaintiff, even though he were invited to do so by the conductor, committed a negligent act in passing around the conductor while on the step, then your verdict must be for the defendant. An invitation by a conductor does not relieve a passenger from the rule that the passenger must use care of an ordinarily prudent man for his own safety."

NO LIABILITY FOR INJURY OF PASSENGER IN ALIGHTING WHILE CAR IS STOPPED TO LET A HOSE CART PASS.

Oddy v. West End Street Railway Co. (Mass.), 59 N. E. Rep. 1026. Mar. 29, 1901.

After a car that stopped for passengers at designated points only had passed the last stopping place before that at which a passenger intended to leave, the conductor called out the name of the next stopping place, and the passenger signaled him. Presently, the car, the rear platform of which was furnished with gates, the one on the side next the other track only being closed, slowed up and stopped. The car had not arrived at the stopping place the name of which had been called, nor was it stopped in consequence of any order or signal given by the conductor, nor for the purpose of delivering or receiving passengers, but was stopped by the motorman because he saw approaching from the direction opposite to that in which the car was moving, a fire engine and a hose cart, which were being run to a fire. Yet as the car slowed up, the passenger, unconscious of what was taking place outside of the car, arose from her seat, and walked to the rear door, reaching the platform as the car came to a standstill, went down the steps, and either stepped into the wheel of the passing hose cart, or was struck by it as she was leaving the car. In the meantime, the conductor was on the rear platform, looking over the closed gate to ascertain when the hose cart should have passed, after having seen the fire engine pass on that side of the car. The time was 8 o'clock on an evening in January.

This stoppage was in accordance with what the supreme judicial court of Massachusetts holds was a reasonable practice. And it is of the opinion that it would not be competent to find the street railway company guilty of negligence upon the evidence. It was right, it says, for the motorman to stop the car where he did upon the approach of the fire apparatus. It is not customary or necessary to notify passengers of the cause of a stoppage occasioned by an obstruction in the street. The conductor, while bound to give the passenger an opportunity to leave at the stopping place which she had indicated to him as the point where she wished her journey to end, was not obliged to inform her that that place had not been reached, unless he knew that she was attempting to leave under a misapprehension, and it was his duty to attend to the very things to which he was attending, namely, to ascertain when the obstruction of the car should cease by the passing of the approaching fire apparatus. Street car companies, carrying passengers in ordinary public streets or highways, are not negligent in not providing means for warning passengers about to leave a car of the danger of colliding with, or being run over by, other vehicles in the street. The risk of being hurt by such vehicles is the risk of the passenger, and not that of the carrier. It is not a danger against which the carrier is bound to protect the passenger or to give him warning. The cases relied upon to show that there was a cause of action, the court adds, were none of them cases in which the danger encountered by the passenger upon leaving a street car was merely that of collision with some vehicle not owned or controlled by the carrier and lawfully using the street.

LIABILITY FOR EJECTION AND SUBSEQUENT ARREST OF HOLDER OF DEFECTIVE JOINT-CONTRACT TRANSFER.

Jacobs v. Third Avenue Railroad Co. (N. Y. Sup.), 69 N. Y. Supp. 981. Apr. 16, 1901.

The appellate term of the supreme court of New York reverses the judgment of the general term of the city court of New York in this case It says that the action was for assault, founded upon the act of a conductor in the employ of the company sued in causing the plaintiff to be ejected from one of its cars. Damages were claimed, also, for an arrest alleged to have been incidental to the ejection, but the accepted theory of the case was that no unnecessary force was used; and, there being no ground for holding that the arrest was unlawful, the cause of action depended upon the question whether the plaintiff was or was not excused from paying his fare upon his tender of a transfer ticket which had been issued to him by an employe of another company. It appeared that the latter company and the company sued were parties to an agreement which provided simply that each should carry passengers transferred from the cars of the other, at intersecting points, without extra charge; this being the extent of the recital of the contract admitted by the pleadings, and nothing further being disclosed by the proof. A transfer slip was handed to the plaintiff shortly after his leaving the car of such other company, and he took passage without unnecessary delay upon the car of the company sued, but, owing to a mistake made by the first conductor, the slip was not acceptable under the reasonable regulations of the company sued; hence the plaintiff's ejection upon his refusal to pay his fare.

The authorities, the court says, support a cause of action in tort, as it is called, where the obedience of the reasonable rules of the company by one employe in refusing to receive a defective transfer or stop-over ticket, issued through the mistake of another employe of the same company, results in the invasion of an innocent passenger's rights; but the liability of the common employer in such a case is traced directly to the mistake of the servant whereby the wrong was caused. In this case, the servant of the company sued was justified in the attitude assumed towards the plaintiff. There was no such community of enterprise upon the part of these two corporations as would suffice to charge the company sued with the consequences of the neglect upon the part of the other company's employes. The business of each was wholly independent of the other, and, so far as was shown, there was no common interest in the fares received, nor in identity of management, such as would be essential to the imposition of the liability sought to be asserted in this action. The plaintiff's contract was with the other company referred to, whose duty to him probably included the issuance of a valid transfer slip; but, as against the company sued, his rights were no stronger than they would have been if, instead of receiving a defective transfer slip, he had been refused one altogether by the other company, and had sought to justify the omission to pay his fare to the company sued by the assertion of the other company's default. Furthermore, if it be assumed that the plaintiff could treat the contract between the companies as made for his benefit, there was still no failure of performance upon the part of the company sued; for it was required only to transport passengers who had been duly transferred, and, through the error of the other company, the plaintiff was not thus qualified. Wherefore, the court holds that a recovery was without support upon the record, and reverses, as above stated, a judgment in his favor.

SITE FOR POWER HOUSE AND COAL POCKETS CANNOT BE ACQUIRED UNDER AUTHORITY TO CONDEMN LAND NECESSARY FOR CORPORATE PURPOSES.

In re Rhode Island Suburban Railway Co. (R. I.), 48 Atl. Rep. 590, 591. Mar. 5, 1901.

A statute authorizing a company to condemn land for "corporate purposes," the supreme court of Rhode Island holds, must be construed to mean for a "public use" only, and is not unconstitutional on account of employing the former expression. Then, it being provided that a certain court shall determine whether the lands described are necessary to the company for its corporate purposes, the supreme court says that it does not mean to question that the term "necessary," as used in the statute, does not mean an absolute necessity, in the sense that the particular land is indispensable, but, rather, that the land, or other similarly situated, is reasonably required for a public purpose. It is also beyond question, it says, that everything which may be necessary for "corporate purposes" is not, by that reason, necessary for public purposes. A common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the parties; the private part is its incidental business, with which the public is not concerned, and which the company manages for its own interests. The company carries passengers over its road as a public duty, but the generation of the power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is the private business of the company.

Here, it was sought to condemn a wharf lot for a power house and for coal pockets, which was selected because of the convenience of getting coal to it on tide water and because it adjoined the lot of a certain other railroad company. It was argued that power was absolutely essential to run the cars, and that this concluded the question of necessity for a power house; that there could be no power without coal, and hence the necessity of coal pockets. But, granting that these were things which the company must supply in order to run its road, the court says that it did not follow that the company had the power to take private property for those purposes. The public, it declares, had no interest in the source of supply, whether the power was purchased, as some of it was, at the time, in this case, or whether each branch of the road had its own station, as was then the case with two branches of this road, or whether there was one central station, which was sought for in this proceeding. Neither was it of interest to the public whether the cars were run by trolley or by storage batteries. Furthermore, it points out that the company was not limited to a particular location for a power house, for coal pockets, or for a water supply, as was evident from the fact that the lot which it here sought for a power house was about five miles from the nearest point on its road. True, the location was claimed as a central point of the system, but this was a matter of convenience to the company, not a necessity. Besides, it involved the taking of land for the purposes of the company, in the city, when another company had the exclusive right to run cars in that city. It is evident, the court holds, that this proceeding was for the private benefit of the company, and not for the public use, and hence not necessary, within the meaning of the statute. The simple fact that the company must have a power house did not convert this necessity into one for a public use. And there is a plain distinction, the court holds, between such a case and that of a steam road where the power must be generated in the locomotives on the tracks, and cannot be transmitted from another place.

NATURE OF INTEREST OF CITY TAKING CAPITAL STOCK IN COMPANY SECURED BY LIEN.

Guarantee Trust Co. v. Galveston City Railroad Co. (U. S. C. C. A.), 107 Fed. Rep. 311. Mar. 19, 1901.

The United States circuit court of appeals, fifth circuit, holds that where a city grants a street railway franchise to promoters, and at the same time agrees to accept a certain number of shares of paid-up capital stock of the company to be organized in lieu of a percentage on the net receipts of the street railway, and in lieu of a bonus for the contract, and such stock is issued to the city, and it is entered as a stockholder on the books of the company, and it is represented on the board of directors by its mayor, who is by agreement elected a director to represent its interest, the interest of the city is that of a stockholder, and not of a creditor. Nor does it think that there was anything in the contract of that character before the court which placed the city in the attitude of a creditor to the company, or clothed it with a single attribute of a creditor, further than in the "sense in which every shareholder is a creditor of a corporation to the extent of his contribution to the capital stock." And it is of this opinion notwithstanding that the contract in question between the city and the company provided that, in the event that the latter should allow iself to become incumbered by debt to the jeopardy of the city's interest therein, then the city should be regarded as having thereby a first lien on the franchise and the roads and fixtures and corporate property of the company, the same to be secured to the city, by proper process, immediately after the organization of the company, and notwithstanding that an instrument was executed which recited the terms of the contract, and, in consideration thereof, created and granted a lien on the corporate property of the company to secure the interest of the city in the company, in the manner and to the extent provided for in the contract. The court considers that the interest of the city in the company was one capable of being secured, and that the evident purpose of the company in providing security for that interest was to give the city a preference in the distribution of the capital stock or net assets of the company over other stockholders. It says that it would not be presumed that the purpose of the company was to make a contract by which the city was to receive the par value or any part of its stock before all the debts of the company were paid. It would require the clearest language to show that such was its purpose, which the court's interpretation of the contract in question fails to disclose was the purpose, while, if it existed, the contract, the court holds, would be contrary to public policy and void.

CLASSING SURFACE WITH ELEVATED AND UNDERGROUND STREET RAILWAYS GIVES NO NEW RIGHT TO DAMAGES.

Ruckert v. Grand Avenue Railway Co. (Mo.), 63 S. W. Rep. 814. May 21, 1901.

The kinds or species of street railways being elevated, underground, and surface, the supreme court of Missouri, division No. 2, holds that they are all clearly included in the act of March 26, 1887, entitled, "An act to restrict the legislative authority of incorporated towns and cities in regard to granting franchises for using the streets and alleys of incorporated towns and cities of this state for elevated, underground, and other street railway purposes, and to provide for the payment of damages caused by the construction and operation thereof," which, as amended in 1889, provides that, "before taking or damaging any property in the construction of a "railroad" under its franchise, the company shall cause to be ascertained the damages that will be done to property on the route and shall pay same to the owner or owners or into court for them. But the court does not consider that this creates any new right to damages, or, in other words, gives an abutting property owner any claim for compensation when it does not appear that he has suffered any damage by the laying of a surface street railway track on the street different from that sustained by all other abutting proprietors on the street.

UNDER RIGHT TO REGULATE RUNNING OF CARS CITY MAY PRESCRIBE CARE TO BE TAKEN.

Schmidt v. St. Louis Railroad Co. (Mo.), 63 S. W. Rep. 834. June 12, 1901.

A city having reserved the right "to regulate the running of cars and the rate of speed at which cars shall be run on said railroad," the supreme court of Missouri, division No. 1, holds that this does not refer only to the speed of the cars, but is very much more comprehensive. To regulate the running of cars, it says, includes the power to prescribe the care that is to be taken to run them through the populous streets with as little danger as may be, consistent with a reasonable exercise of the franchise granted.

A COMPANY ADJUDGED NEGLIGENT CANNOT RECOVER AGAINST A TELEPHONE COMPANY.

Atlanta Consolidated Street Railway Co. v. Southern Bell Telephone & Telegraph Co. (U. S. C. C., Ga.), 107 Fed. Rep. 874. Mar. 14, 1901.

A judgment having been recovered against an electric street railway company for damages for what is thereby adjudged to be original and actual negligence on its part, as where, for example, a recovery was had against one on the allegation that it had negligently and carelessly permitted a feed wire to rest upon a call wire of a telephone company, causing the death of an employe of the telephone company, the railway company cannot, after having paid the judgment, the United States circuit court, northern district of Georgia, holds, recover over against the telephone company, as for instance on the allegation that it was that company that was guilty of the fatal negligence, as in letting its call wire rest on the feed wire, and this even assuming that the telephone company was also guilty of negligence, it being necessary, in view of the adjudication, to then consider the two as joint tort feasors or wrong-doers.

PEDESTRIAN SHOULD OBSERVE AND USE JUDGMENT—TROLLEY CARS NOT A CLASS BY THEMSELVES.

McGrath v. North Jersey Street Railway Co. (N. J.), 49 Atl. Rep. 523. June 17, 1901.

The court of errors and appeals of New Jersey holds that one who passes on foot along a crosswalk over a highway is bound to use his powers of observation to discover approaching vehicles, and should exercise a reasonable judgment as to when and how to cross without collision. This rule governs the relation of a pedestrian to all vehicles, including trolley cars. Trolley cars have characteristics of their own, but are not, therefore, set apart for legal treatment in a class by themselves. Their peculiarities are circumstances that have sometimes to be taken into account in applying the general rule to a particular case.

WHERE FRANCHISE, ROLLING STOCK, TOOLS, ETC., ARE TAXABLE—INJUNCTION AGAINST SEIZURE OF CARS FOR TAX.

City of Detroit v. Donovan (Mich.), 86 N. W. Rep. 1032. July 10, 1901.

Under a statute providing that the personal property of a street railroad shall be assessed in the township, village, or city where its principal business office is situated, and that the track, road, or bridge of any such company shall be held to be personal property, and may be assessed in the township, village, or city where the same is located, used, or laid, the supreme court of Michigan holds that, as the franchise should be treated as a part of the roadbed, within the statute, and attaching to every part of the same, as it does, it seems clear that the assessment of the franchise should be made in the townships through which the railway runs. But the rolling stock, tools, etc., being no part of the track, but personal property, should be assessed, under the statute, in the city where the principal business office of the company is located. Moreover, the court holds that, while, as a general rule, injunction will not lie to restrain the collection of a personal property tax, an exception exists where a valuable franchise would be interfered with, as where the receiver of taxes threatens to seize a company's cars to satisfy a personal property tax assessed against it, and injunction will be deemed an appropriate remedy.

STATUTE AUTHORIZES TRAFFIC ARRANGEMENT FOR CARRIAGE OF MERCHANDISE.

State v. Dayton Traction Co. (Ohio), 60 N. E. Rep. 291. Mar. 26, 1901.

Section 3443-11 of the Revised Statutes of Ohio provides that interurban street railroad companies "shall have power to lease, purchase or make traffic arrangements with any other street railroad company as to so much of its tracks and other property as may be necessary or desirable to enable them to enter or pass through any city or village, upon the same terms and conditions applicable to other street railroads. And any existing street railroad company owning or operating a street railroad shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public." By favor of the provisions of this section, which it holds contain definite authority therefor, the supreme court of Ohio holds that an electric railway company owning and operating a road upon a street of a city and an interurban electric railway company may enter into a valid traffic arrangement for the carriage of merchandise for hire upon said street.

ENFORCEMENT OF RETALIATORY ORDINANCE LIMITING SPEED TO SIX MILES AN HOUR ENJOINED.

United Traction Co. v. City of Watervliet (N. Y. Sup.), 71 N. Y. Supp. 977. July, 1901.

A city ordinance passed at a time of excitement limiting the rate of speed of all street cars in the city to not exceeding 6 miles per hour, notwithstanding that for a long time prior thereto a speed of 12 miles per hour had been permitted, and making a violation of the ordinance a misdemeanor, a special term of the supreme court of New York, Albany county, holds is one materially impairing the property rights of the company; is subversive of the interests and convenience of the public; is unreasonable, and therefore void; and that the aid of equity may therefore be invoked to restrain the enforcement of the ordinance. To this the court adds that if there had been any unjust discrimination against the residents of the city on the subject of transfers by the company, or if the act of the company in abrogating the sale of reduced-rate tickets has resulted in an unjust increase of rates for the transportation of passengers, as was claimed in this case, the remedy must be found otherwise than in the passage of a void ordinance, the enforcement of which was not only destructive of the property rights of the company, but also a serious interference with the rights of the traveling public, not all of whom, by any means, were residents of the city.

DEMAND AS TO FARE ON ANOTHER BRANCH IS VOID WHERE NO FOREIGN CONDITION CAN BE ATTACHED TO APPROVAL OF PLANS.

Fair Haven & Westville Railroad Co. v. City of New Haven (Conn.), 49 Atl. Rep. 863. July 23, 1901.

A street railway company being authorized, under the state statutes and its charter to lay a double-track railway over a certain route, on complying with the conditions which the city may impose, it having no power, however, to impose conditions wholly foreign to the plan submitted by the company, the supreme court of errors of Connecticut holds that an imposition of a condition requiring that a five-cent fare be established to a certain point more than a mile from any portion of the route referred to and described in the plan submitted by the company, and upon a different branch of its road, is wholly foreign to the plan, and beyond the power of the city to impose, and is void.

STARTING CAR WHILE INTENDING PASSENGER HAS HOLD OF SAME.

Fay v. Metropolitan Street Railway Co. (N. Y. Sup.), 70 N. Y. Supp. 763. June 7, 1901.

As a car stopped, an intending passenger with a transfer took hold of the upright rail, to be ready to step up when the people in front of him had got on. But when he went to step up, the car gave a sudden jerk, and he went with it, and fell into a trench. The first appellate division of the supreme court of New York holds that a dismissal of his complaint was error. It says that the company was bound to give him a reasonable time to board the car, and the evidence would have justified finding that it was negligent in this respect. Neither does it think that the man was, as a matter of law, guilty of contributory negligence. Having hold of the car about to board it, when the car suddenly started, there was presented an emergency which required the exercise of judgment as to the best course to avoid being injured. If, to avoid being thrown down by the sudden starting of the car, he held on to the car to steady himself until he could let go in safety, it was certainly not negligence as a matter of law. But for the existence of the trench in the roadway alongside of the track, which he had not observed, he would probably have escaped injury by adopting the course that he did; but his falling into the trench was caused by his being dragged along by the car. And the court says that it seems to it that the question of contributory negligence was one for the jury. Nor can there be any doubt, it declares, but that the starting of the car was the proximate cause of the injury.

RIGHT TO PUT IN ADDITIONAL TURNOUTS.

Detroit Citizens' Street Railway Co. v. Board of Public Works of the City of Detroit (Mich.), 85 N. W. Rep. 1072. May 7, 1901.

A company was duly authorized by a city ordinance to construct and maintain a single-track street railway along certain streets. The ordinance authorized it "to construct, use, and operate all necessary and convenient tracks for turnouts, side tracks, curves, and switches, wherever the same might be necessary," the same to be constructed and in operation within one year from the date of the passage of the ordinance. It was constructed within the time. In the neighborhaad of ten years afterwards, a written application was presented to the board of public works of the city to put in four additional switches on one of the streets, to be placed exactly half way between existing switches. This application was denied for the reason that the authority of the board of public works to grant such terms was questioned by the common council, in which was vested by statute the sole power to convey authority to construct street railways within the city. But the supreme court of Michigan holds that no new grant of power from the common council was required, and affirms a judgment giving the company a writ of mandamus to compel the board of public works to grant its application. It says that the common council had exercised its legislative function, and thereby defined the streets which the company might occupy, and the character of the track to be placed and maintained thereon. The contract was that the company might construct and maintain a single track, with such turnouts as should be made necessary by the increase of travel. No further legislative act was necessary to confer this right. This right was not limited to those needed at the time the road was constructed. Both parties contemplated that travel might increase, and thereby more cars and more turnouts would be rendered necessary. If a new grant of power from the common council were required, it would follow that the roadbed as originally constructed must remain so during the life of the company, unless amicably changed; for a contract cannot be changed except by mutual consent. Moreover, the company's right at the time of construction to lay switches, etc., was limited by public convenience, and it would not then have been permitted to lay more than the then traffic demanded, and when public travel demanded more, the company could be compelled to lay same.

DEPOSIT CONSIDERED AGREED DAMAGES FOR FAILURE TO CONSTRUCT ROAD.

Whiting v. Village of New Baltimore (Mich.), 86 N. W. Rep. 403. June 4, 1901.

A village ordinance granting a franchise for the construction of an electric railroad through the village contained a provision that the same should be void unless accepted within 10 days and the grantee should further within 30 days after the acceptance "deposit with the clerk of said village a certified check payable to the village treasurer of said village in amount the sum of $2,000, which said check shall be returned to said grantee, or to his order, upon the completion of said railway within the time herein provided for; and in case of a default of construction of said road within the time provided shall be collected and the proceeds thereof placed in the village treasury in such fund or funds as the board of trustees of said village may at that time direct." The supreme court of Michigan holds, reversing the judgment of the lower court in favor of the assignee of the check for the amount thereof with interest from the commencement of suit, that the $2,000 was to be treated as liquidated damages, and not as a penalty, or security for the performance of the contract, the construction of the road never having been entered upon. In other words, it holds that unless the road was completed within the time specified, the check was not to be returned, but was to become the property of the village. It says that this was one of that class of cases where the damages for a breach of contract are impossible to be estimated with certainty by reference to any pecuniary standard. In such cases the parties themselves, being more intimately acquainted with all the peculiar circumstances, may compute and agree upon the actual or probable damages. It even says that it might be conceded that the city, in its corporate capacity, suffered no damages by failure to build the road; but the contract was made by the corporate officers for and in the interests of the inhabitants, and for such damages they could and did agree with the grantee of the franchise. And it holds that the fact that other franchises were granted to other parties with a less deposit of money, or with no deposit at all, was of no consequence here, in determining what the parties intended in this particular instance. The parties were bound by the contract made.

CARE REQUIRED IN EXERCISE OF PARAMOUNT RIGHT WHERE A STREET USED BY VEHICLES ENTERS BUT DOES NOT CROSS THAT USED BY CARS.

Hewlett v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 71 N. Y. Supp. 531. July 25, 1901.

It is well settled, says the second appellate division of the supreme court of New York, that a surface street railroad car has a paramount right of way over the part of a street covered by its rails, and lying within any two lines of corresponding rails, save at intersecting streets, or where there is a practical continuation of a bisecting street, where the rights of the car and of the vehicle crossing are equal. The reason for this limitation is plain. The car has a right to cross, and must cross, the street; and the vehicle has a right to cross, and must cross, the railroad track. But the reason for the rule ceases where there is no cross street. Continuing, the court states that it has said that this paramount right must be exercised in a reasonable and in a prudent manner, and that therefore it thinks that, though such right exists where the rails pass a cul-de-sac, or street running into, but not running across, the street on which the rails are laid, yet the exercise thereof must be commensurate with the obvious difference between the unbroken part of a street and the part where broken by the entrance of a cul-de-sac which is used by vehicles for access to that street. For though the vehicles cannot use the cul-de-sac to cross the street, which necessarily is to pass over the rails, they may use it to enter the street; and therefore the paramount right must be exercised with ordinary reason and prudence, in view of this use and the physical condition of the locality. For example, if a motorman knew, or, in the exercise of ordinary care, prudence, and experience, ought to have known, that at the locality in question vehicles were accustomed to enter the street, and that the condition of the entrance was such as warranted such vehicles, when managed with the same degree of care, to encroach temporarily upon the track while turning into the street from cul-de-sac, it would be error for this court to refuse a request to charge the jury that this paramount right must be exercised with such ordinary and reasonable prudence as was commensurate with such circumstances. Such qualification would be proper, because the right is but paramount, and not exclusive.

BEGINNING EXTENSION BEFORE MAIN LINE—WHEN IT MAY BE ENJOINED—WHERE AUTHORITY FOR MAIN LINE IS WANTING.

Hannum v. Media, Middletown, Aston & Chester Electric Railway Co. (Pa.), 49 Atl. Rep. 789. July 17, 1901.

Undoubtedly, a company, having a charter route, and legally adopted extensions, may begin the construction at any point most convenient to itself. But beginning at an extension is not the natural and usual way, and, when challenged, the supreme court of Pennsylvania holds, the company must show affirmatively its intention to complete the whole, and that its work on the branch is the bona fide beginning of the entire operation. No case affords any sanction to the idea that the company may proceed to construct an extension, and in the meantime abandon or indefinitely defer the carrying out of its original franchise. Again, the court says that municipal consent cannot create or enlarge corporate franchises. Here, in this case, there were a trunk franchise and branch franchises. Assuming that the city had consented to the branches, though that was disputed, yet, if the trunk had no sufficient legal existence, the branches also must fail, and the city's consent would not avail the company. And the court holds that, the charter route or trunk franchise not including any part of the city, an owner of property on the line of a proposed extension in the city, being as much entitled to attack the foundation as the superstructure, could apply for an injunction against the work in the city on the ground that the company had no authority to construct its charter or trunk route in the townships, and the company would be bound to show at least prima facie a complete right to do the act complained of.

THROWING PASSENGER FROM RUNNING BOARD BY JERK AFTER ALMOST STOPPING—STANDING AFTER SIGNALING.

Sweeney v. Union Traction Co. (Pa.), 49 Atl. Rep. 66. May 13, 1901.

A passenger riding in an open summer car with transverse seats when 100 feet from the crossing where he wished to get off, arose, turned towards the back platform, raised his hand as a signal, and called to the conductor to stop at that street. The conductor pulled the bell, and, as the speed slackened while the car was crossing the street, the passenger stepped to the side, and stood with one foot on the car and the other on the running board. Then, when he observed that the car was not stopping on the further side of the street, he withdrew his foot from the running board to the body of the car, and again signaled the conductor to stop the car. The conductor then again pulled the bell, and the speed was slackened until the car came almost to a stop, and it was then suddenly accelerated, giving the car a jerk, which threw the passenger, who was standing on the body of the car, and holding firmly to the vertical hand rail, to the street. Under this testimony the case was for the jury, the supreme court of Pennsylvania holds, in affirming a judgment for damages against the company. It says that such management of the car indicated negligence on the part of those in charge of it, and the passenger could not, as matter of law, be adjudged negligent because he stood at the side of the car, holding the hand rail, after his signal to stop had been promptly responded to by the ringing of the bell, and the speed was being reduced. Had he been jolted from the running board while crossing the street referred to, or had he remained standing inside the car while he waited to reach the next regular stopping place, a square distant, a different question would have arisen. But whether, after there is a response to his notice, a passenger should resume his seat while the car is being brought to a full stop, depends upon circumstances, and, unless they are exceptional, it is a question of fact for the jury.

RAILROAD AGREEING TO MAINTAIN TURNPIKE BRIDGE IS NOT BOUND TO REBUILD IT STRONG ENOUGH FOR TROLLEY ROAD.

West Shore Railroad Co. v. Bergen Turnpike Co. (N. J. Ch.), 49 Atl. Rep. 578. July 6, 1901.

A contract by which a right of way across a turnpike was obtained for a steam railroad provided that the railroad company should erect and maintain a substantial permanent iron bridge over its railroad, so that the turnpike travel might be carried over the railroad by such bridge. The railroad was constructed to an excavation as provided for in the agreement, and an iron bridge for the turnpike over the railroad was erected in accordance with the provisions of the contract, and in a manner and with a strength satisfactory to the turnpike company. Subsequently, the turnpike company proposed to install railroad tracks for a trolley line over its bed and across the bridge. The railroad company thereupon applied for an injunction to restrain the turnpike company from using the bridge for the purpose of its trolley road until the turnpike company should have reconstructed it with sufficient strength to maintain a trolley road, or indemnify the railroad company against any damage that might result from overloading the bridge. In other words, the real question raised was, which of the parties should incur the expense of rebuilding the bridge. The engineer of the railroad company stated, in effect, in an affidavit, that the bridge, while it was sufficiently strong for all ordinary travel by vehicles and foot passengers, was not strong enough to sustain the increased weight due to tracks and trolley cars. Nor was there anything to show that at the time the bridge was built it was in the contemplation of either of the parties that it was to be used for anything else than the ordinary travel over a turnpike. It was designed and adapted for that purpose, and was accepted by the turnpike company as sufficiently strong. Under these circumstances, the court of chancery of New Jersey holds, that the burden of increasing its strength was cast upon the turnpike company. A learned argument was addressed to the court to sustain the indisputable proposition that the laying of a trolley road over the highway was no additional burden upon the land. But that proposition, it says, had no application to this case. There was no objection on the part of the railroad company to the laying of the trolley road as such. The objection was to the casting upon it of the burden of rebuilding and maintaining a bridge of a more expensive character than that contemplated by the parties, and practically agreed upon by them at the time of making the contract. And the court granted the injunction asked for by the railroad company.

ROAD THAT OF COMPANY LAWFULLY HAVING CAR ON IT AS TO PROTECTION DUE EMPLOYE.

Kelly v. Union Traction Co. (Pa.), 49 Rep. 70. May 13, 1901.

Under a statute providing that when any one shall be injured or killed while lawfully engaged on or about the road or premises of a railroad company, or in or about any train or car thereon, of which company such person is not an employe, the right of action against the company shall be such only as would exist if such person were an employe, the supreme court of Pennsylvania holds that the road on or about which the accident occurs need not be owned by the company to bring it within the terms of the statute, but the use, by agreement, of the road of another company makes it the latter's road in contemplation of the act. Applying this rule where the two tracks of one company were not only used by it but by another company under a contract therefor and there were two switches near the end of the line for transferring cars from one track to the other, the first car to arrive using the switch nearest the end of the line, the court holds that, when a car of the company owning the tracks went to the end switch and a car of the other company stopped at the other switch and the first-mentioned car came back down the track, because the motorman had failed to turn his switch, and struck and injured the conductor of the second car while putting up his fender, the conductor was lawfully engaged in the service of his employer (the company using the tracks under contract), on or about its road, within the meaning of the statute, and not on or about the road of the company owning the tracks, and hence the statute could not be invoked by the latter as a defense to his action for damages. The court says that the track at the point where this conductor's car stood was in the use of the company for which he was working, and therefore had, by agreement of the parties, become for the time being the road of that company. Its employes in the operation of its cars had a right to be there, and they could enforce their right to protection against the negligence of every one save the co-employes of that company. Wherefore, it holds, that it followed that, as the conductor was not engaged on or about the road of the company owning the tracks, or in or about any car thereon, at the time he was injured by the negligence of its servant, the statute did not make him a quasi employe of the latter, and it could not, as above stated, invoke the statute as a defense to the conductor's action for damages.

BACKING OF CAR NOT TO BE WATCHED FOR ORDINARILY.

Central Railway Co. v. Knowles (Ill.), 60 N. E. Rep. 829. June 22, 1901.

The common course of street cars being forward, and not backward, the supreme court of Illinois says that a person, traveling along a public street, will not ordinarily be required to watch a car that has passed, to see if it is not going to stop and run backward, instead of going forward. It also holds that it is proper to submit to the jury the question of negligence where there is evidence that a street car was backed when there was no one on the rear end of it who was looking out for travelers, the conductor having his back turned in the direction that the car was backed.

LIABILITY FOR INCOMPETENCY OF MOTORMAN AND DEFECTIVE APPLIANCES—EXTENT OF RIGHT OF WAY—DOCTRINE OF TRESPASSERS INAPPLICABLE.

Little Rock Traction & Electric Co. v. Morrison (Ark.), 62 S. W. Rep. 1045. May 4, 1901.

The supreme court of Arkansas holds that it was not error, in an action for damages for injury to a horse, to refuse to give an instruction to the jury which only made the company liable for the personal negligence of its motorman in not exercising the proper care to avoid the injury after he saw the perilous situation of the horse, and ignored the question of the incompetency of the motorman and the defect of the brakes and appliances, as factors which, one or both, might have been the real cause of the failure to avoid the injury after the danger was apprehended. The court says that if a motorman does not know how to stop a car when it is desired to stop it, and the circumstances go to show that the incompetency was known or should have been known to the master when he put the motorman in charge of the car, the master is directly to blame; for he has, in effect, failed to provide himself with the means to prevent injuries which he could otherwise do. And the same rule applies in the case of defective brakes and other appliances. Besides, the court holds, negligence in employing servants and in using defective machinery, while antecedent, in a sense, is yet contemporaneous with such an injury, in the more important and the more practical sense.

Again, the court says that the cases cited in support of the contention that the company owes no duty to trespassers on the track, and therefore is not liable for antecedent negligence such as want of care in selecting servants and keeping machinery in repair, in cases of contributory negligence, were railroad cases, and were in most respects not applicable to cases involving the duty of street car companies; for it may be said, in a general way, that there are no trespassers on the streets of a city. Every one has a right to go on the streets, and on any part of them. In a sense, it is said that street cars have the right of way; but that is because of the weight, speed, and momentum of the cars, the great number of persons carried on them, their necessity to run on schedule time, and their strict confinement to the appropriate track, and other like circumstances. Except to accommodate these peculiarities, the street cars have no real right of way over all travelers on the streets, and it cannot, therefore, be said there are any trespassers. The case is different with railroads. The crossings of public roads are the nearest analogy of the case of railroads to the case of a street car line. The street car company owes a duty to all persons on the streets, perfectly commensurate with the relative situation between it and them. One of those duties is to exercise reasonable care not to injure, for the privileges of both are such as call forth such care at all time.

CONSTRUCTION OF VALIDATING ACT—UNWARRANTED PROVISION AS TO FREIGHT NOT FATAL—NO INJUNCTION BECAUSE PART OF PROPERTY ACQUIRED IN VIOLATION OF LAW—MAY CONNECT ACQUIRED LINES—INJURY TO INTEREST IN ANOTHER LINE—DOUBLE TRACKS NOT TWO ROADS.

Brown v. Atlanta Railway & Power Co. (Ga.), 39 S. E. Rep. 71. May 20, 1901.

The supreme court of Georgia holds that the act of that state of August 31, 1891, providing that "all charters heretofore granted by the secretary of state to street and suburban railroad companies are hereby confirmed and declared to have had full effect from their dates," was, in effect, a general law giving the consent of the general assembly that street and suburban railroad companies theretofore organized under the charters referred to might in the future exercise the corporate powers mentioned in such charters; and with this legislative consent such companies became, after either an express or an implied acceptance of the provisions of the act, de jure or lawful corporations, with all the powers granted in the charters; and this was true whether the charter in a given case was originally granted without authority of law, or in violation of law. And the court holds that even if in 1891 the general assembly had no power to confer upon street car companies the authority to become common carriers of freight, the grant of such authority would not in any way affect other powers which had been lawfully granted to such companies.

That a corporation may have acquired a portion of its property in violation of law is not a sufficient reason, the court holds, for enjoining it from exercising its legitimate corporate powers, at the instance of a private citizen whose property will be damaged by the exercise of such powers.

A street car company which has acquired the lines of street railway of two other companies may, when authorized by its charter, and with the consent of the authorities of the city in which its lines of railway are situated, connect the lines acquired from the other companies by laying its tracks upon such portions of a street of the city as may be necessary to make the connection.

A street car company having authority to lay its tracks along the streets of a city will not be enjoined from laying its tracks along a given street, at the instance of one claiming to have an interest in a line of street railway in another street, on the ground that the construction of the new line may operate as an abandonment of the line in which he is interested.

A general power in the charter of a street railway company to construct a line of street railway authorizes the construction of double tracks upon the streets of a city, provided the authorities of such city consent that the streets may be so used. There is no merit, the court says, in the contention that a double-track railroad is two railroads, and that a single track is one railroad.

DUTY OF MOTORMAN TO BE ON THE LOOKOUT FOR SUDDEN DANGER ESPECIALLY WHEN PASSING OBSTRUCTIONS CAUSED BY PRIVATE IMPROVEMENTS.

Buehler v. Union Traction Co. (Pa.), 49 Atl. Rep. 788. July 17, 1901.

It is the duty of a motorman, the supreme court of Pennsylvania holds, at all times to be on the alert, looking ahead of him for any sudden or unexpected danger, and this is especially true when he is about to pass a point where private improvements have, to some extent at least, temporarily obstructed the street.

NUMBER AND LATITUDINAL LOCATION OF TRACKS ARE FOR MUNICIPAL REGULATION.

Baker v. Selma Street & Suburban Railway Co. (Ala.), 30 So. Rep. 464. June 29, 1901.

The supreme court of Alabama says that it cannot consent to the proposition that it is essential to the validity of a franchise or right to construct and operate a street railway in the public streets of an incorporated town or city that the declaration of incorporation and the consent of the municipal authorities should specifically designate the exact location latitudinally in the streets over which such railway is to be constructed and operated, or the number of tracks to be laid. These, it holds, are matters which are wholly within the power of the municipal authorities to regulate and control, after consent given and obtained for the construction and operation by the railray company of its line of Railway.

RIGHT TO ENJOIN ANOTHER COMPANY FROM ILLEGALLY INERFERING WITH TRACKS.

Atlanta Railway & Power Co. v. Atlanta Transit Co. (Ga.), 39 S. E. Rep. 12. May 20, 1901.

A street railway company which has constructed, and is legally operating, a line of railway in the streets of a city, the supreme court of Georgia holds, is possessed of such a property interest as gives it a legal right to maintain an application to restrain a similar company from interfering with its line of tracks already laid, and from constructing a line of road over its private property without authority of law. Moreover, to such an application the city is not a necessary party defendant.

USE OF ROAD FOR TRANSPORTATION OF FREIGHT—BY LESSEE INCORPORATED AS FREIGHT CARRIER—NO INJUNCTION FOR ABUTTERS—LIABILITY FOR INJURY TO ADJACENT PROPERTY.

Aycock v. San Antonio Brewing Association (Tex. Civ. App.), 63 S. W. Rep. 953. May 22, 1901. Rehearing denied June 26, 1901.

The use of the streets for the operation thereover of a street railway for the transportation of freight, the court of civil appeals of Texas holds, is consistent with the purposes for which streets exist, and, when authorized by law, abutting property owners are not entitled to have such use restrained by injunction, or declared a nuisance. Moreover, where the owner of a street railway is an ordinary street railway company, and has no authority itself to operate a freight railroad over its line, but another corporation that actually has such power has obtained, with the sanction of the proper authorities, the right to so use this street and its line, the court holds that an injunction against such use would be improper. On the other hand, where an ordinary street railway company practically leases its line to a company which has power to operate a freight railroad over it, and is a party to the use thereof for freight traffic, receiving a rental and other benefits therefrom, the court holds that it will be liable equally with such other company for injury to adjacent property.

LIABILITY FOR INJURY FROM ABANDONED TRACK BECOMING UNCOVERED.

Paducah Railway & Light Co. v. Ledsinger (Ky.), 63 S. W. Rep. 11. May 29, 1901.

A track having been abandoned, the trolley wires taken down and the track covered with gravel, but, afterwards, either from an insufficiency of gravel, or the wear of the street, the rails became exposed, and, by reason of the exposure of the rails, a man driving down the street was thrown from his wagon and injured, the court of appeals of Kentucky holds that, while the evidence of negligence was conflicting, it was sufficient to warrant the submission of the case to the jury, and that their finding for the man was not so against the evidence thaat it could be disturbed by it, the defect in the street having existed so long that the company and city, which were sued together, were chargeable with notice of it.

A TROLLEY LINE IS NOT A RAILROAD USE AND IS TAXABLE LOCALLY.

In re Jersey City & Bergen Railway Co. (N. J. Sup.), 49 Atl. Rep. 437. June 10, 1901.

Property not possessed and used by a railroad company for railroad purposes being subject to local assessment only, the supreme court of New Jersey holds that property which is used as a trolley road is not so possessed and used, and hence is lawfully taxed locally only, instead of being assessable by the state board of assessors. In short, it holds that a trolley line is not a railroad use.

INTEREST IN SOIL OF HIGHWAY TAXABLE AS REAL ESTATE.

Mayor, Etc., of City of Newark v. State Board of Taxation (N. J. Sup.), 49 Atl. Rep. 525. June 10, 1901.

While it says that it must be assumed that the laying of trolley tracks in a highway imposes no additional servitude upon the title of the abutting owner, and that as between the company and the abutting owner nothing is taken from such owner for which he is entitled to compensation, the supreme court of New Jersey holds that, nevertheless, as between the public and a trolley company the latter has such an interest in the soil of the highway over which it passes as is taxable as real estate.

CITY AS OWNER OF CROSS STREETS IS NOT AN ABUTTING PROPERTY OWNER.

City of Council Bluffs v. Omaha & Council Bluffs Street Railway & Bridge Co. (Ia.), 86 N. W. Rep. 222. May 21, 1901.

Under a city ordinance which provided that "where the tracks are laid upon a street already paved, the company shall pay the property owners abutting for the paving between the rails and one foot outside thereof," the supreme court of Iowa holds that the city was not entitled to recover for paving between the tracks and one foot outside thereof at street intersections of such street. To say that the words "property owners abutting" were intended to apply to the city, as owner of its streets, the court declares would be at variance with what is commonly understood, and foreign to what was intended. If it had been intended to impose this liability on the company, it would not have been left to construction, but would have been plainly provided for.

NOT SUBJECT TO STATE BOARD OF RAILROAD COMMISSIONERS—TERM "RAILROAD" RESTRICTED.

Board of Railroad Commissioners of the State of California v. Market Street Railway Co. (Cal.), 64 Pac. Rep. 1065. May 15, 1901.

Section 22, of article 12, of the constitution of the state of California, which was framed and adopted in 1879, provides: "The state shall be divided into three districts as nearly equal in population as practicable, in each of which one railroad commissioner shall be elected. * * * Said commissioners shall have the power and it shall be their duty to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies." Looking to the words used, the context, the object in view, and the evils that were intended to be remedied, the supreme court of California holds that the words, "railroad and other transportation companies" do not include a street railway company in a municipality engaged in the business of carrying passengers on street railroad cars, and hence that such a company is not subject to the supervision of the board of railroad commissioners of the state of California, under the provisions of an act of the legislature entitled "An act to organize and define the powers of the board of railroad commissioners," approved April 15, 1880. Furthermore, the court says that in the ordinary acceptation of the term "railroad company" or "railroad," it is not understood to mean a street railway engaged in the business of carrying passengers the entire distance, or any part of the distance, over which the road runs, for one and the same fare.

INJURY OF EMPLOYE OF TELEPHONE COMPANY WORKING ON WIRE WITHOUT PERMISSION.

Sias v. Lowell, Lawrence & Haverhill Street Railway Co. (Mass.), 60 N. E. Rep. 974. June 18, 1901.

A street railway company having granted to a telephone company the right to use its poles, the latter company agreeing to "assume all risks as to any damages which might arise from or to their employes while working on the poles," and an employe of the telephone company being injured while at work upon a wire of the railway company, without its permission, express or implied, the supreme judicial court of Massachusetts holds that the railway company was not liable to him for damages, the highest duty that the railway company owed to him while he was thus at work being that of not willfully or wantonly injuring him. Still less does it consider answerable a second street railway company which supplied the power, but which owned neither pole nor wires, the evidence tending to show that the charging of the wire that caused the injury was due to contact from the sagging of a guard wire which was above the trolley wire to such an extent as to touch the trolley wire when pushed against it by the trolley of a passing car.

NOT LIABLE FOR INJURY OF PERSON USING INSTRUMENT TO REACH TROLLEY WIRES.

Proctor v. San Antonio Street Railway Co. (Tex. Civ. App.), 62 S. W. Rep. 939. Apr. 10, 1901. Rehearing denied May 15, 1901.

A man whose son and son-in-law had a contract to remove a large pile of cinders from the yard of a street railway company at its power house carried their dinner to the two men and took up a hoe with an iron handle to dig down the cinders which were at that place about seven feet high, and, about the second blow, caught the hoe on the trolley wire, and received an electric shock which almost instantly killed him. The court of civil appeals of Texas holds that the company was not liable for damages. It says that if any one owed it to the man to give warning of the danger of standing on steel or a wet surface, he having stood near, if not on, the rails of the street car track, and the cinders, being hot, having been saturated with water, and with wet hands grasping an iron hoe and touching a charged trolley wire, it devolved on the contractors, whose servant he was. Nor does the court consider that any liability was imposed by a city ordinance which provided that "no switch, lamp, motor, dynamo, or any other conductor having exposed uninsulated parts shall be erected or maintained where any person unacquainted with the dangers of the same could easily come in contact with the same." It does not think that the ordinance had reference to persons coming in contact with wires by using some instrument to reach them, but was evidently guarding against accidents from bodily contact with the objects named.

LIABILITY FOR INJURY IN COLLISION OF TRACK-LAYER RIDING HOME ON TICKET.

Peterson v. Seattle Traction Co. (Wash.), 65 Pac. Rep. 543. June 24, 1901.

On rehearing in this case, which has been heretofore reported under the above heading, the supreme court of Washington says, among other things, that it expressly holds that, if the employe's transportation constituted a portion of the consideration for his services, he became a passenger for hire, just the same as anybody else who parts with anything of value for transportation; but, if the consideration for his services was independent of his transportation, and his transportation was a mere gratuity bestowed upon him by his employer, as claimed by the company, he stood like any one else traveling on a free pass so conditioned, namely, exempting the company from any liability for injury to him, notwithstanding his employer would not probably have bestowed the transportation if the recipient had not been in its employ.

MONEY FORFEITED TO CITY BY ONE COMPANY CANNOT TO BE DONATED TO ANOTHER COMPLETING WORK, AND MAY BE RECOVERED AFTER ATTEMPT TO DO IT.

Adams v. Jackson Electric Railway, Light & Power Co. (Miss.), 30 So. Rep. 58. Mar. 25, 1901.

Two questions were presented here: (1) May money, the property of a city, the fruit of a forfeiture by one company of its contract to construct a street railway, etc., be donated by the board of mayor and aldermen to another company, on and after its completion of such work, under a contract between it and the city having no reference to that fund, (2) May such money be recovered from such company so receiving such donation by the state revenue agent for the use of such city? After the most careful consideration, the supreme court of Mississippi answers the first question in the negative, and the second in the affirmative. It holds that when the forfeiture occurred in this case, the money became the property of the city, although it was in the hands of its custodian, and that the donation of it to the second company was an appropriation of the money of the city to a corporation in direct and palpable violation of the state constitution, in consequence of which no title to the money passed to the second company, and being money of the city, a cause of action accrued to the state revenue agent to recover it.

LIMIT TO DISTANCE AT ALL NECESSARY TO LOOK FOR CAR—WHAT MAY BE ASSUMED AS TO APPLIANCES FOR REDUCING SPEED.

Woodland v. North Jersey Street Railway Co. (N. J. Sup.), 49 Atl. Rep. 479. June 10, 1901.

A trolley company, the supreme court of New Jersey holds, can claim no superior right to that of the driver of any other vehicle in the use of the highway, regard being had, however, to the former's fixed line of travel. Each must have due regard to the rights of the other in its use. Then it says that the plaintiff must be considered as having acted with a knowledge of these mutual rights and liabilities. The rules that regulate the crossing of steam railroads have little application here. It was contended that the plaintiff did not look, as he should have done, before crossing. But the rule is, as to crossing a roadway, that one must use his powers of observation in respect to other passers thereon, and a reasonable judgment to avoid a collision. He is not required to extend his observation to an approaching car, however distant, but only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety. In this case, the plaintiff, in a well-lighted street, at night, when about to cross the highway in his carriage, a short distance from the regular crossing, saw a trolley car approaching 250 feet away. He at once proceeded to cross with his horse on a walk, without further watching the approach of the car, which collided with his carriage, causing him personal injuries. Upon the trial of his action the court refused to nonsuit on the ground of contributory negligence, and the supreme court, affirming judgment in his favor, holds that the ruling was correct. And it says further that the plaintiff had a right to assume that the car was furnished with appliances to reduce speed and to stop, and that it would not contribute to run at a rate of speed incompatible with the safe use of the street by other vehicles. Nor was he found to refrain from crossing for fear that the motorman would not reduce the speed.

RELATIVE RIGHTS OF CAR AND WAGON.

Moore v. Charlotte Electric Street Railway Co. (N. C.), 39 S. E. Rep. 57. June 4, 1901.

In what appears to be its first decision on the subject, the supreme court of North Carolina says it admits that the company has the superior right to the use of its own tracks, as otherwise it could not use them at all. If a wagon and a car meet, going in opposite directions, the wagon must turn out, because the car cannot. If going in the same direction, the wagon must also get off the track, because the car cannot go around the wagon, and the public convenience requires the car to travel at a greater speed than the ordinary vehicle. But this superior right is not exclusive, and will not justify the company in needlessly interfering with the convenience of the public, or excuse it from the consequences of its own negligence. Where the wagon and car meet at right angles, either can stop long enough for the other to pass without serious inconvenience; and, as the wagon must cross the track in order to proceed, it is said that under such circumstances the rights of the wagon are somewhat greater than between crossings, with a corresponding obligation resting upon the railway company to exercise greater care, on account of the greater probability of meeting vehicles and pedestrians, with the increased risk of accidents. But this rule cannot be extended to interfere with the right of the public to cross the track with reasonable care at any point that their convenience may suggest.

HOW INCORPORATED RATHER THAN USE OF ELECTRIC POWER AND INCIDENTAL FUNCTIONS DETERMINES CHARACTER OF ROAD.

Malott v. Collinsville, Caseyville & East St. Louis Electric Railroad Co. (U. S. C. C. A.), 108 Fed. Rep. 313. Apr. 9, 1901.

This company was incorporated under the Illinois act of March 1, 1872, providing for the incorporation of rairoad companies, to construct and operate an electric railroad for the carriage of passengers, etc. The inquiry then arose, when it wanted to cross a steam railroad, as to whether it was a railroad company within the meaning of the act of May 27, 1889, relating to the crossing of one railroad by another, and as to whether its exercise of the right of eminent domain was subject to the provisions and limitations of that act. The United States circuit court of appeals, seventh circuit, holds in the affirmative on both points. It holds that the fact that its trains were to be operated by electricity instead of steam did not affect its place in the laws of the state, as a railroad company. There is nothing in the acts of 1872 and 1889, it says, that restricts railroads therein mentioned to the use of steam as a motive power, or prevents existing steam roads from changing their motive power to that of electricity. There is nothing in these acts that necessarily or fairly excludes its application to electrical roads, as they now exist; indeed, these electrical roads, in the speed of their trains, in the distances travelled, and in the capabilities for transportation, are well within the field of public utilities hitherto occupied by the steam railroads alone. And the court cannot conceive that these acts, so far, at least, as they are reasonably applicable, were not meant to cover every form of railroad that, in the march of events, answers the purposes of general transportation. Nor, it holds, does their incidental function as street railways, in the towns or cities traversed, lift them out of the railroad statutes; for it has been held that an elevated road—wholly intramural—is, in its creation and its powers, within the contemplation of the railroad statutes, and exercises its right of eminent domain by virtue of those statutes.

A ROUTE MUST BE CONSIDERED AS A WHOLE—LEAVING OUT A BRIDGE MAKES A DIFFERENT ONE.

Appeal of Cherryfield & Milbridge Electric Railroad Co. (Me.), 50 Atl. Rep. 27. July 23, 1901.

A route or location of a street railroad presented to the municipal officers for their approval, the supreme judicial court of Maine holds, cannot be considered merely with reference to particular streets, one by one. It must be viewed as a whole. The municipal officers are to act in a judicial capacity. They are vested with a judicial discretion. Application is made to that discretion. They may consider the width and other conditions of the strets, the convenience and safety of the public, and, in case where it is proposed to cross a bridge, in addition to the matters already spoken of, they may consider whether the bridge has the requisite strength to support a street railroad and moving cars. And, the court says, it may well be that, taken as a whole, a proposed location, including a bridge, would be manifestly unsuitable, while the same location without the bridge would be proper. The reasons which might properly lead the municipal officers to refuse approval of the first location might be entirely wanting in the second. Even so simple a change might put an entirely different phase upon the questions presented for the consideration of the municipal officers, and their action, or refusal to act, might thus be placed upon new and entirely different grounds. In short, the location as a whole, as presented to the municipal officers for their action, is not the same.

CITY MAY AUTHORIZE THIRD RAIL LAID BY COMPANY WHOSE RIGHT TO USE IT IS IN LITIGATION—USING ENDS OF TIES, FILLER BLOCKS AND LONG TIE RODS.

State v. King (La.), 29 So. Rep. 359. Feb. 18, 1901.

The supreme court of Louisiana holds that the city of New Orleans was acting within the scope of its administrative and police power in authorizing the laying of a third rail in connection with the rearrangement of the tracks upon, and the paving of, one of its streets, though the question of the right of the particular company actually laying such rail to make use of the same was involved in litigation. Whether it was advisable to lay the rail under such circumstances, in order to provide against the possible future breaking up of the pavement for that purpose, the court says, was a matter of legislative discretion. Street railway companies, it goes on to state, do not own the soil of the streets of New Orleans upon which their tracks are laid, and their ownership of the ties, rails, etc., constituting their tracks, is qualified by the fact that the city has the right to authorize other roads to use such tracks. In this case, an injunction having been issued to restrain the laying of a third rail, the laying of which was authorized by the city, the court holds that the injunction should have been dissolved as on bond upon the application of the city, and on bond upon the application of the company acting under such authority; and mandamus to that effect was made peremptory.

Another thing the court says is that the rights of a company on a street where space is measured by inches are not to be determined by any rule which might be applied if its tracks were laid through a wilderness, upon a right of way of the usual width. Then, it says that it was not advised that it was necessary, considering the character of the paving which was being done by the city, that cross-ties should be used, and still less that it was essential that they should project beyond the rails constituting the track. Therefore, it declares itself not in a position to hold that the laying of the third rail where it was proposed to lay it, resting upon the ties supporting the track of the objecting company, would, from any point of view, conflict with the rights granted to that company. As to the substitution of "filler blocks" for spikes and of long tie rods for short ones, it thinks it enough that the company's property was not injured, and that it was not thereby interfered with in the use of its tracks. To this the court adds that it has no reason to believe that there was or could be anything in the grant to that company which would authorize it to so maintain its tracks as unnecessarily to obstruct the laying of others, and that, in its opinion, it would be a misapplication of a valuable principle of law to hold that the acts in question constituted a taking of private property without compensation.

VALIDITY OF SUBCONTRACTOR'S LIEN ON NEW POWER HOUSE.

Pittsburg Testing Laboratory, Limited, v. Milwaukee Electric Railway & Light Co. (Wis.), 86 N. W. Rep. 592. June 20, 1901.

A subcontractor's lien may be enforced against a new power house of a corporation engaged in operating a system of street railways and an electric light and power plant in a city, the supreme court of Wisconsin holds, where such lien could be enforced if the premises were owned by a private party, if the new power house is not essential to the operation and maintenance of the corporation's system of street railways and its electric light and power plant for the public purpose for which the corporation was established, as where it is engaged in carrying out and completing its contract with the city by means of its plant and appliances other than the new power house. There can be no question in Wisconsin, the court says, but that electric railway corporations, as well as other railway corporations, although constructed for the private emolument of those engaged in such enterprises, are highways, which have, nevertheless, been established under the authority of law, and primarily for the convenience and benefit of the public. Debts against such corporations must be recovered in the ordinary way, so as to allow them to progress with their undertaking, and accommodate the public. The rule to be deduced from the best-considered cases seems to be that a railway is an entirety, and that under the general language of a statute no lien attaches to a particular section or part of the road essential to its operation and maintenance for public purposes; but that, under the general language of such statutes, a lien may be enforced against such structures and property of the corporation as are not essential to the operation and maintenance of the railway for the public purposes for which it was established. In other words, courts are not authorized, in the construction of such general language, to repeal pro tanto or to that extent the charter of a corporation so created primarily for the public benefit; especially in violation of a well-established rule of construction of such general statutes so far as public rights are concerned.

INJURY OF PASSENGER BY ACT OF CONDUCTOR SUDDENLY PLACED IN A POSITION OF PERIL.

Kantrowitz v. Metropolitan Street Railway Co. (N. Y. Sup.), 71 N. Y. Supp. 394. July 9, 1901.

Aftr a car had stopped to allow several passengers to alight, and one, at least, of them had alighted, and another was about to alight, a large truck drove up behind the car, the driver shouting to some one to get out of the way, endeavoring to stop his horses, and the horses sliding over the wet pavements, so that the pole was elevated, with an apparent danger of running into the car and injuring the passengers upon it. There was no one, apparently, in the act of alighting, the passenger referred to as about to alight, and who was injured being upon the platform. Thus was created a condition under which the conductor was required to act at once, and, having acted in a way that seemed to him to be for the protection of the passengers, the first appellate division of the supreme court of New York holds that, even if he was guilty of an error of judgment, in starting the car, which was extremely doubtful, the company was not liable. Then, too, the court holds that, as the jury might well have found from the plaintiff's evidence that she was thrown by the conductor striking her and pushing her against the car, and not by the starting of the car, the jury should have been instructed that, if this accident to the plaintiff was caused by the act of the conductor, who was obeying a natural impulse in seeking to escape an actual peril for which he was in no wise responsible, and a person of ordinary prudence might have acted in the same way under the same circumstances, the defendant company was not guilty of negligence, and the plaintiff could not recover. In short, the court says that it fails to see that the jury were justified in treating this act of the conductor, whether to avoid an injury to himself or to protect the passengers of the car, or whether the accident was caused by the conductor striking the plaintiff in his attempt to start the car to avoid a collison with the truck, or by the actual starting of the car as negligence for which the company was responsible.

CARE REQUIRED OF MOTORMAN—OF PERSONS ON STREET AT CROSSING—THEIR DUTY TO SEE CAR—EVIDENCE—REGULATIONS IN OLD FRANCHISE—ORDINANCE REQUIRING CONTINUOUS RINGING OF BELL UNREASONABLE.

Stafford v. Chippewa Valley Electric Railroad Co. (Wis.), 85 N. W. Rep. 1036. Apr. 30, 1901.

It is not actionable negligence for the motorman in charge of a street car, when the car is in operation upon a street and approaching a street crossing, the surpeme court of Wisconsin holds, to fail to exercise the highest degree of care or such care as a vigilant or prudent person would exercise under the same or similar circumstances. It is sufficient if he exercises the care of a person ordinance requiring the continuous ringing of a bell upon a street car while such car is in motion upon a street is unreasonable and of average prudence in the same or similar circumstances. Moreover, the court says that an instruction that a person in the circumstances above indicated must exercise due care or proper care, unexplained, fails to instruct and may mislead. Coupled with instructions to the effect that the term refers to the highest degree of care, or any degree of care other than that of a person of average prudence under like or similar circumstances, it is error. Again, the court says that the motorman in charge of a street car approaching a street crossing must use ordinary care for the safety of travelers liable to get into the pathway of the car, but he has the right to expect that such travelers will use ordinary care to inform themselves of the approach of the car and not to retard its passage.

As a rule, the court further says, the mere operation of a street car so as to render it dangerous for a person to cross the street in front of it is not negligence.

The mere acquirement by purchase of a street car franchise containing regulations as to the manner of operating cars, as a condition of a new and independent grant which does not refer to or in any way make the provision of the old grant a part of the new one, such condition being clearly imposed to prevent a conflict of rights, does not add to or restrict the provisions of such new grant.

A city ordinance is not valid unless reasonable, and whether it satisfies that requirement or not is a judicial question. A city to that extent void for any purpose, unless made a condition of the grant. If a requirement of the character above indicated is valid for any purpose because made a condition of the grant itself, the violation thereof does not constitute actionable negligence or evidence of such negligence, because, as regards the safety of travelers on the street, it is unreasonable.

A traveler upon a street at a street crossing, desiring to cross the street car track there situate, has not the same right to require the speed of a car to be slackened to enable him to pass over the track as the person in charge of the car has to require him to give way to allow the car to pass. It being the duty of the traveler upon the street, in approaching a point where he desires to cross a street car track, to look and listen for a coming car and to perform that duty when and where he will have reasonable opportunity to render his efforts in that regard effective, it is as much his duty as a matter of law to see an approaching car which is in sight and in dangerous proximity to the crossing, and not to negligently place himself in the way of it, as it is to look for the car; and evidence that he performed the duty of looking but did not see the coming car does not raise a question of fact for the jury to determine. Testimony of a person or any number of persons that he or they when approaching a street car track with a view of crossing it, looked along the track for a coming car and did not see one, though a car was in plain sight and so near the point of observation as to render an attempt to cross the track in front of it dangerous, is inconsistent with reasonable probabilities and a jury should not be required or allowed to consider the subject as involving a disputable question of fact.

ATTEMPTING TO CROSS TRACKS WHERE CARS RUN CLOSE TOGETHER.

Legare v. Union Railway Co. of New York City (N. Y. Sup.), 70 N. Y. Supp. 718. May 17, 1901.

The fire appellate division of the supreme court of New York says that whether or not a person crossing a street in the city of New York, occupied, as most of them are, by cars propelled by electricity or cable, and often running at a high rate of speed, is guilty of contributory negligence, where there is evidence which would justify a finding that the company was negligent, must usually be for the jury; for, in a case where a car can be controlled so as to avoid running down a person crossing the track, it cannot be said that it was negligence as a matter of law for the person to attempt to cross the track. In many of the streets, during the busy portion of the day, these cars are running constantly, within a few feet of each other, and if a person about to cross the track is to wait until no car is in sight the track would be impassable, except at the risk of the pedestrian's being guilty of contributory negligence. The right of a railroad company to use the public streets is conditioned upon the right of the public to also use them in the ordinary way, and no railroad company has the right to so block the streets that the public are excluded from crossing them, except at the risk of being run over. It cannot, therefore, be contributory negligence as a matter of law for a person to start to cross a track when the car is at such a distance that the motorman can prevent it running down a person crossing the track, if attending to his business, and operating the car in a careful and prudent manner. Here, two boys started to cross a track and the court holds that they had a right to suppose, seeing a car 75 feet away, and crossing in plain view of the motorman, that he would hold the car in control so as not to run them down. They certainly had a right, it says, to assume that he would not put on power to increase the speed of the car. But there was evidence that when the car was about 15 feet from the boys he put on additional current, and also evidence that would justify a finding that, if he had checked the car when the boys started to cross, they could have both crossed in safety, whereas one was fatally injured. Wherefore, the court affirms a judgment for damages against the company, holding that, on the whole case, the question of negligence and contributory negligence, was for the jury.

WATERING OF STREET COMPELLED BY INJUNCTION.

Newcomb et al., Selectmen, v. Norfolk Western Street Railway Co. (Mass.), 61 N. E. Rep. 42. Sept. 3, 1901.

This suit was brought to compel the street railway company to water a street through which its track ran, and the supreme judicial court of Massachusetts has ordered an injunction therefor. It holds that the requirement in the grant of location to the company that it should water the street over a portion of the way between cerain dates was a lawful restriction within the provision of the statutes allowing selectmen to grant a location "under such restrictions as they deem the interests of the public may require." The well-known effect of running cars is to raise a dust, and the requirement, although affirmative in form, in substance, it says, restricts the company to running cars in such a way as not to raise a dust. And it holds that the restriction is a regulation which it is given power to enforce, by virtue of a statute empowering it to compel the observance by street railway companies of all laws applying to them and the regulations of the selectmen. It is true, it says, that the statute stated in one place that the power was given "according to the usual course of chancery proceedings," and that it might be argued that this restriction should not be enforced because it is not the usual course of chancery proceedings to compel the specific performance of continuous acts or duties for an indefinite time. But the court is of the opinion that, in view of the obvious purpose of the statute that such regulations should be enforced specifically, it ought to go further than ordinary practice might lead it to go in the absence of legislation, and to do all that it can to see that the requirement is performed. And it thinks that some confirmation of this view is derived from the fact that regulations concerning the removal of snow and ice were before the mind of the legislature when it gave the court the power mentioned. Moreover, it says that, practically, there will be no difficulty in the specific performance of the street watering. When it is decided that the company is bound, probably there will be no further trouble, especially as the location provides a domestic tribunal by requiring the work to be done to the satisfaction of the superintendent of streets.

STATE MAY REQUIRE ADDITIONAL SAFEGUARDS AT CROSSING, WITH STEAM RAILROAD, WHEN NEEDED, IMPOSING THE EXPENSE ON BOTH ROADS.

Detroit, Ft. Wayne & Belle Isle Railway v. Commissioner of Railroads (Mich.), 86 N. W. Rep. 842. July 2, 1901.

When the joint use of a crossing is obtained, is the position tenable that, because one road is older than another, the junior road must not only compensate the senior road for its present damage before it can cross, but for all time it must bear any additional future cost which may be made necessary by the erection and maintenance of appliances for the safety of the public, resulting from the increased use of the crossing? The supreme court of Michigan thinks that this question must be answered in the negative. It holds that when the right to use the crossing is once acquired, the right of the several corporations to this use is reciprocal, so far as is consistent with the kind of use made of the crossing by them. Again, it say that new dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, it is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars. This danger is occasioned, not by the steam road alone, nor by the electric road alone, but by both of them. And the court declares that it has no doubt that under such circumstances the state, in the exercise of its police power, can take such steps as will minimize the danger, and can impose the expense of so doing upon the corporations causing the danger; has no doubt of the right of the legislature to authorize the railroad commissioner to order the construction of additional safeguards at crossings and apportion the expense incident thereto between the companies affected. Or, in the language of Mr. Justice Grant, who dissents, the court, holds that when a steam railroad company has condemned a right of way, and extended its tracks across a street or highway, on which is an existing street car line, and at the time the public travel upon the street or highway was not such as to require the erection of gates, etc., for the protection of the public, but subsequently, owing to the increase of population, the increase of tracks and trains by the railroad company, and the increase of travel upon the street or the highway, the erection and maintenance of such safeguards becomes essential for the protection of the public, the street railway company can be required to pay a portion of the expense.

LIABILITY FOR INJURY OF ONE PASSENGER BY ANOTHER, ESPECIALLY AFTER THE LATTER HAS ONCE BEEN PUT OFF THE CAR.

United Railways & Electric Co. of Baltimore v. State (Md.), 49 Atl. Rep. 923. June 13, 1901.

It is not because a particular passenger is known by the carrier's servants to be in peril of injury at the hands of a fellow passenger or stranger that a failure to use the means at command to protect him will be actionable negligence; but, the court of appeals of Maryland says, it is because there is a known or discoverable danger that an injury may be done to some passenger, and because no effort is made to avert that injury from all the passengers, that the carrier is liable if an injury is inflicted on one of the passengers when it could have been prevented. It is just as incumbent on the carrier to protect all his passengers from assault by a fellow passenger, when his servants have knowledge or the means of knowing that an assault on some one is imminent, and when they have time and the means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation.

Consequently it will not do to say, after an assault has been made, that the servants of the carrier did not know or could not have foreseen that the particular individual who was assaulted would be injured by an assault, if they were apprised, or with proper care could have known, of circumstances which indicated that some one would be injured unless the disorderly passenger or stranger were ejected or controlled. In short, if there is danger of any one being injured, and the employes fail to remove, subdue, or overpower the turbulent individual, after knowing that there is danger, or after they ought to have known that there was danger, if they had exercised proper care, that failure is negligence, for the consequences of which the company is answerable.

Moreover, the court holds here that if a certain passenger, who had assaulted another passenger before he was ejected from the car, and who was drunk, disorderly, and turbulent, was properly put off the car because his presence was a menace to other passengers, then it was the plain duty of the employes who put him off, to have kept him off. They demonstrated their ability to keep him off by having put him off, and there being equally sufficient reason for keeping him off that there was for putting him off the car, the failure to keep him off was an act of negligence. If, on the other hand, every effort was made by the employes to avert the injury, but was made without success, then the company would not be liable. It was a question of fact for the jury, and the jury having returned a verdict against the company, the court affirms a judgment for damages for the injury caused by the passenger just referred to after his return to the car, assaulting another passenger, without the slightest provocation, striking him a vicious blow in the eye, which caused the rupture of a cerebral blood vessel, and thereby produced paralysis, and ultimately death.

RIGHT TO CROSS RAILROAD TRACKS AT POINT OF SOME DANGER—COMPARED TO RIGHT OF BUS LINE.

Louisville & Nashville Railroad Co. v. Bowling Green Railway Co. (Ky.), 63 S. W. Rep. 4. May 7, 1901.

The weight of authority, the court of appeals of Kentucky says, is to the effect that there is no jurisdiction in equity to enjoin a street railway from crossing a steam railroad's track at grade in a public street unless such jurisdiction has been conferred by statute or some constitutional provision. The court, however, declares itself unable to find anything in the constitution of that state to exclude street railroads from the operation of section 216 thereof, which provides: "All railway, transfer, belt lines and railway bridge companies shall allow the tracks of each other to unite, intersect and cross at any point where such union, intersection and crossing is reasonable or feasible." It says that the language of the section is broad enough to cover all railways. The provision that crossings shall be allowed when reasonable or feasible is necessarily a restriction of the right to such as are reasonable or feasible. To hold that the section only applies to crossings of the right of way, and not to crossings in streets, would be to add to the section an exception which the general words used do not justify.

Then the court takes up the question of whether the crossing in contest was reasonable or feasible. It was shown by the railroad company that trolley wires overhead would be a source of danger in the operation of its trains; also that electric cars were liable to stop from failure of the current, and that this might occur on the crossing; and that the passage of the regular trains on the railroad would delay the street cars. But the court answers that all these objections would exist at any grade crossing, and if they were sufficient it would follow that there could be no grade crossings of such a railroad by the street car line. Such a rule it does not think would be in keeping with the constitutional provision. Then, recurring to the particular crossing in question, it says that the number of tracks to be crossed, and the number of trains passing (something like 40 or 45 a day) presented a state of case where, if the crossing were not in a street, it would have great doubt if it should be allowed. For instance, if a crossing was allowed over the railroad company's tracks and yards on the square north, this would destroy the yard. But the public had a right to the use of the street, as well as the railroad company. It had no right to make an unreasonable use of the street. A part of the testimony as to the dangerousness of the crossing and the length of time it was obstructed by the trains might, to some extent, grow out of the use by the railroad company of its tracks at this point in switching and making up its trains. While it was entitled to a reasonable use of the street for the passage of its trains, it had no right to make an unreasonable use of it.

And as the public had the right to cross, subject to the reasonable use of its tracks by the railroad company, the court says that it is unable to see that the addition of the street car line would so materially change the situation that the crossing should be declared unreasonable or not feasible. To illustrate: If the street railway company had undertaken to run a bus line from the landing on the river to the central part of the city, crossing the railroad at this point at regular intervals, just as the street cars would do, clearly the railroad company could not have enjoined its operation. Again, it was shown that the street was a narrow one, and that when the gates were down it frequently became congested with vehicles. But a street car in addition, the court says, would add little more to the congestion than a bus would. A flagman was maintained at the crossing. It appeared from the proof that an approaching train could be seen for some distance on either side, and, if this space were built up, the flagman, with his gate, would give warning of danger. It was true, the flagman might be negligent; but this might occur anywhere, and the danger to the car was no greater than to other vehicles on the street.

AUTHORITY TO GRANT FRANCHISE—TO INDIVIDUAL—ASSIGNMENT TO COMPANY—MAY TAKE PRIVATE PROPERTY—CANNOT BE ENJOINED UNTIL DAMAGE IS PAID—NOR AS A NUISANCE—NOR WHERE CHARTER IS AS RAILROAD.

Watson v. Fairmont & Suburban Railway Co. (W. Va.), 39 S. E. Rep. 193. June 18, 1901.

When the legislative act incorporating a city provides that "the council of said city shall have power to grant and regulate all franchises in, over and under the streets, alleys and public ways of the said city, under such restrictions as shall be provided by ordinance, but no exclusive franchise shall be granted to any individual or corporation," the supreme court of appeals of West Virginia holds that the legislature thereby delegates to the council of such city authority to pass an ordinance granting to an individual or a corporation the right to construct and operate a street railway in the streets of such city. And, although such franchise is usually conferred upon a private corporation, it may be granted, the court holds, to an individual, and, with the consent of the council, having such delegated power over the subject, he may make a valid assignment of the same to a private corporation organized for the purpose of constructing and operating such street railway.

The holder of such franchise, although privately interested in the enterprise thereby provided for, the court further holds, is nevertheless an agency or instrumentality in the hands of the public authorities for the accomplishment of public purposes and benefits, and subject to their control, and private property may lawfully be taken and damaged in the execution of the ordinance, subject to the provisions of the constitution and statutes that just compensation shall be paid to the owner of the property so taken and damaged. But an abutting property owner whose property is not to be taken or destroyed, and thus virtually taken.

in the construction and operation of the road, but only injured and damaged cannot, under the laws of the state, the court holds, enjoin its construction until his damages are ascertained and paid. Nor, the execution of the work having been authorized by the legislature, as above stated, can an individual enjoin it upon the ground that it is a public nuisance and specially injurious to his property, even in a case in which he might do so had such authority not been given.

Again, when the certificate of incorporation of a railway company states that the purpose of the corporation is to construct and operate a railroad, designating certain points as termini of the proposed road, and that it is to run through a certain city, and said company lawfully acquires a franchise to construct and operate a street railway in said city, and, in pursuance of the ordinance granting the franchise, is proceeding to build its track in one of the streets of said city, the owner of real estate adjoining said street, the court holds, cannot enjoin the company from so doing, whether the charter of .the company authorizes it to construct and operate a street railway or not, unless, upon the ordinary principles of equity jurisprudence, he has grounds for equitable relief against the company. If it be true that the corporation is exceeding its corporate powers, that fact is not alone sufficient ground for equitable interference at the suit of a person who is not a member of the company.

SUPERVISORY POWER OF COURT THAT APPOINTS COMMISSIONERS.

In re Nassau Electric Railroad Co. (N. Y.), 60 N. E. Rep. 279. Apr. 30, 1901.

The "determination" referred to in section 94 of the New York railroad law, which closely follows the language of the state constitution where it provides that the "determination" of the commissioners appointed when property owners do not consent to the construction of a street surface railroad, "confirmed by the court, may be taken in lieu of the consent of the property owners," the court of appeals of New York holds, means a determination not only that is in favor of the road, and hence there is no express authority for action by the appellate division of the supreme court (the appointing court) when the report is unfavorable. However, it does not follow from this, it goes on to say, that the supreme court has no authority to set aside such a report for fraud, mistake, or gross irregularity; for the statute does not prohibit such action. The power of the court to appoint commissioners implies power to supervise the conduct of the persons appointed,—at least, to the extent of seeing whether they disobeyed the statute which called them into existence, or acted corruptly, or failed to comply with the order appointing them, by publishing and serving the notices specified therein. The commissioners are not appointees of the legislature, but of the court, pursuant to the provisions of the constitution, to decide a certain question "after a hearing of all parties interested." They are not a distinct tribunal, for they are appointed by the court, and report to the court. If they refuse to hear the parties in interest, the court can set aside their determination and appoint new commissioners to do what the law requires, in the manner specified, after due notice and an opportunity to be heard. While not bound to strict compliance with common-law evidence, or to any particular method of procedure, except as specified by statute, their action is judicial in character, and must, to a reasonable extent, conform to judicial methods; for, by command of the constitution, a "hearing" is to be had, and a "determination" made. A substantial departure from what is fairly to be implied from the use of the words "hearing" and "determination" in the fundamental law authorizes the court which appointed the commissioners to set aside their action and proceed anew. If, for instance, they state in their report that their only reason for deciding that the road ought not to be built was some fact utterly immaterial, or if they show conclusively that they exercised powers they did not possess, or failed to exercise the powers they did possess, because they thought the law withheld them, it is clear that their decision would not be a determination, within the intent of the law. If, through misconduct, palpable error, or accident, they fail to make such a report as the law contemplates, it is the duty of the appellate division, upon proper application, to set their report aside and appoint other commissioners, or remit the matter to the same commissioners with proper instructions. Unless the appointees of the court keep within the law, as well as its own order, it necessarily has power to interfere, not by way of review as upon appeal or certiorari, but in the exercise of original jurisdiction flowing from the power to appoint, as otherwise the object of the appointment would be defeated by the misconduct of the commissioners. When the commissioners make a favorable report, their judgment and that of the appellate division must concur, before the report can become final and effective; for confirmation is expressly required. When they make an unfavorable report, no confirmation is necessary; but the commissioners are not a law unto themselves, and their determination, when made in violation of law, is not such a determination as the court is obliged to accept from its own appointees. So the court holds that in this case, where an unfavorable report was made, that it was the duty of the appellate division either to exercise its discretion, and refuse to hear the application to set aside the report and appoint new commissioners because no grounds or reasons for intereference were specified in the notice of motion therefor, or to examine the record and decide whether the methods pursued by the commissioners were substantially within the law.

VALIDITY AND APPLICATION OF ACT GIVING COMSIONER SUPERVISION OVER CROSSINGS—HIS POWERS—REQUIRING OVERHEAD BRIDGE—THE EXPENSE—WHAT COURT MAY REVIEW.

Jackson & Suburban Traction Co. v. Commissioner of Railroads (Mich.), 87 N. W. Rep. 133. July 19, 1901.

The supreme court of Michigan holds constitutional the act of 1893 entitled "An act to regulate the construction of the tracks of railroads and street railroads across each other, and the stringing of wire, electric or other, over railroad tracks, and relative to the maintenance of such tracks heretofore so constructed and wires heretofore so strung," which was, in 1897, made a part of Act No. 35 of the Laws of 1867, by an amendment which provided that all street railway corporations organized or doing business under this act shall be subject to the supervisory control of the commissioner of railroads as provided by the above act of 1893, etc.

The court does not decide whether the act can be applied to rights which vested previous to its passage. But it holds that a company which has acquired its rights since the passage of these laws takes its rights subject to a condition that at crossings of steam roads it shall comply with the requirements of the state, to be determined by the railway commissioner, as to the method of crossing, and the expense of the same. It was competent, it says, for the state to forbid any crossing at grade, and the law indicates an intention to do so in all cases where it is reasonably practicable to avoid grade crossings. A railroad company is not in a position to say to the state: "It is true you have imposed conditions that we cannot or will not comply with; therefore we propose to build a road in a place and in a way that you have not authorized." The state is not obliged to authorize the building of railways in the streets; hence, if it chooses to do so, it may impose conditions.

Continuing, the court says, with regard to this case, where the commissioner of railroads determined that the crossing by the traction company of a steam railroad should be by overhead bridge to be at least 22 feet above the surface rails of the tracks crossed, after those tracks had been lowered at least 3 feet, that if there was authority for the claim that the exercise of the right of eminent domain was necessary before the traction company could construct the road which it was authorized to construct, manifestly it would have to wait until provision could be made for it. It could not do an unauthorized thing, merely because the authorized one was not feasible. So, if it was true that it could not build an overhead crossing until it had secured rights from abutting proprietors, which it had no power to condemn, it would have to acquire them in some other way, or not build the road where contemplated.

Again, the court says, the character of the crossing required, or its cost, might not meet the traction company's approval, but the determination by the railroad commissioner was one of the conditions imposed. If by the fact that the act gave it the right to except to the ruling of the commissioner it was meant (which the court does not say) that this court would review his discretion upon the facts, it could, at the most, the court says, be in a case where there was a clear abuse of discretion, and it would be necessary for the court to have the facts clearly before it to do that. But in this case no evidence was returned, and there might not have been any taken, for the commissioner returned that he viewed the premises, and satisfied himself, in ways not formally judicial (as he might lawfully do, the court says), of the circumstances and conditions upon which his action was predicated. No issue was made in this court, and, it says, it must take his return as true.

But the court does not understand it to be the duty of the commissioner to order overhead crossings in all cases, or to impose all burdens arising from the separation of grades upon the applicant in all cases. In this case he did it, so far as the bridge was concerned, but not as to the lowering of the steam roads. He determined the height to which the traction company must construct its bridge, but it did not devolve upon it to lower the steam-road tracks. They would omit obedience at their peril, and the traction company need not be concerned about it.

Last of all, the court says that whether or not it is reasonably practicable to separate grades is a question of judgment. The law does not mean that it shall be done in all cases where it is physically possible. Any reason that shows the unfitness of a separation of grades is sufficient to warrant a grade crossing. Nor is the court prepared to say that the expense might not be taken into consideration, as well as the effect upon abutting property.

RIGHTS AND LIABILITIES OF TOWN AND TRACTION COMPANY RESPECTIVELY WHERE A TRAVELER IS INJURED BY A DEFECT IN THE HIGHWAY DUE TO THE COMPANY'S NEGLIGENCE.

Town of Waterbury v. Waterbury Traction Co. (Conn.), 50 Atl. Rep. 3. Sept. 27, 1901.

A traveler on a raised highway fell down a bank on the side thereof where there was no railing, and was injured He sued the town for damages, and, after he had recovered a judgment against it, the town sought to recover over against the traction company that used the highway, charging that the latter had taken down the railing and had negligently suffered it to remain down.

A notice was given by the town to the traction company almost immediately after the action was brought against the town, and long before the trial of that case, which informed the traction company of the pendency and character of the action, of the reason why it was claimed to be ultimately liable, and in effect requested it to take part in the defense. This notice the supreme court of errors of Connecticut holds, was not insufficient because in it the town did not offer to surrender the entire defense of the case to the traction company. The traction company was not entitled to assume the defense to the excluson of the town from the case. To render the judgment binding upon the company, it was only necessary to show that it had received fair notice and information of the pendency of the suit and of its claimed liability, and been offered such an opportunity to participate in the defense for the protection of its interests as it would have had if it had been a party of record. Had it desired, it could have been made a party upon its own application to the court. Had it chosen to take a more active part in the defense, either as a party or otherwise, the town would still have been enitled to remain in the case, both for the purpose of showing that it was not liable in the action and for the protection of its claim, which was adverse to that of the traction conmpany, that, if liable, it was upon a ground which gave it a right of action over against that company.

Then the court holds that if the evidence showed that the injury was produced by the alleged wrongful act of the traction company, the fact that the town failed to perform its duty in not seeing to it that the traction company put up the railing again, and that by such negligence on its part it became liable for the injury to the traveler, did not deprive the town of its remedy over against the traction company. The town and company were in that case to be considered as in equal fault, and the principle that there can be no contribution between joint tort feasors or wrongdoers did not apply. As between it and the public it was undoubtedly the duty of the town in such case to properly protect travelers against the danger which the traction company had created, and by its failure to do so it became liable in damages to the one injured. But the primary cause of the accident was the act and fault of the traction company in taking down the railing and failing to restore it, assuming that it took it down as alleged. As between the town and the company, there was no co-operation in the act of negligence which caused the injury. The town did not permit the company to leave the railing down. If the company took it down, it promised impliedly, if not expressly, to do so in a way not to endanger public travel, and to put it up again. If it failed to keep that promise, it could not justly charge the town with negligence either in having relied upon such promise or in having failed to compel its performance. If the traction company removed the railing, and left it down, as alleged, the fact that the town had knowledge of the defect, and neglected to repair it, although it had a fair opportunity to do so, would not prevent a recovery by the town against the company in this action.

POWER OF CITY TO REQUIRE SUBSTITUTION OF GROOVED RAILS—ORDINANCE CONSTRUED—"FIXTURES" DEFINED.

City of Kalamazoo v. Michigan Traction Co. (Mich.), 85 N. W. Rep. 1067. May 7, 1901.

The supreme court of Michigan says that it is essential that municipalities retain that control over the public streets and highways which is necessary for the protection and proper use of the public. Courts will jealously guard the right of such control. It must be a very plain provision, indeed, in a contract, which will justify the courts in holding that this power has been conveyed away. Where doubt exists, such contracts will be construed against the surrender of such power. Again, it says that it is too late now to question the rule that street railway corporations may obtain contractual rights in streets and public highways which the municipality cannot repudiate or annul, when such rights are not inconsistent with the ordinary uses of streets and highways. That rule is settled. The authorities do not, however, go so far as to hold that the grant of a right to use a certain kind of rail is irrevocable. On the contrary, the conclusion seems to be that, when the use of another kind of rail becomes necessary for the protection and safety of the public, the right to use the specified article must give way to the necessities and requirements of the public. Such contracts must be liberally construed in favor of the municipalities.

Here, a city ordinance granting authority for the construction and operation of an electric street railway provided: "All track hereafter laid, either for extensions or for the purpose of relaying present track, may be of the style known as 'T rail,' or 'girder rail,' at the option of said grantee, its successors or assigns; but, whatever style of rail is used, the same shall not weigh less than forty pounds to the yard if 'T,' and not less than fifty-two pounds to the yard if girder, rail." It also provided: "The city council may from time to time require the said grantee, its successors and assigns, to use such fixtures and appliances upon its said road, plant, and cars as may be deemed necessary to the public safety in the operation of said road," and it reserved the right "to make such further rules, orders, and requirements as may from time to time be deemed necessary to protect the interests, safety, welfare, and accommodation of the public in relation to said railway, not inconsistent with the provisions of this ordinance," excepting to reduce the rate of fare or alter or repeal section 1 containing the grant of authority.

Now, this ordinance, fairly construed, the court declares, could not be held to mean that the company, in the construction of its roadbed in accordance with the provisions of the ordinance, obtained the right, during the existence of its franchise, to maintain its roadbed and rails in the same condition as when laid. The ordinance contemplated improvements which experience might show to be essential, in the growth of the city, for the convenience, welfare, and safety of travelers upon its streets, and the right to compel such improvements was reserved. The words "fixtures and appliances" as used must be given some force. The right to compel their use was clearly reserved. The term "fixtures" does not refer to movable things; it refers to things that are fixed. Trolley poles, overhead wires, rails, and ties are fixtures. But what the court more particularly holds is that the city had power to require the company to substitute a grooved rail for a T rail when it decided to change the paving of the street from wooden blocks to brick, the stipulated facts showing that a brick pavement and the T rail could not be used together without leaving the surface of the street not only rough, uneven, and inconvenient, but dangerous.

ABUTTER MAY ENJOIN BUILDING OF ELEVATED TRESTLE UNTIL HE IS COMPENSATED.

State ex rel. Smith v. Superior Court of King County (Wash.) 66 Pac. Rep. 385. Oct. 14, 1901.

This suit was brought to enjoin the Seattle Electric Company from building a trestle and elevated railway in a public street in front of the relator's property. The trestle was to be constructed at a height of about 25 feet at one end of his property, and 15 feet at the other end thereof, above the grade of the street, and to occupy about 25 feet in the middle of the street, which was 66 feet wide. He averred that this would cut off the access to his property and interfere with his light and air. A temporary injunction was granted, with a proviso that it should cease to be operative upon the company's executing a bond for $30,000 conditioned that it would pay him any damages which he might suffer by the construction of the trestle and railway tracks. But the supreme court of Washington holds that it was error to attach this proviso, and that it had jurisdiction to issue a writ of certiorari or review, under the constitution and statutes of the state. It holds that through this proviso the relator was denied the constitutional guarantee that "no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner." It also holds that the remedy by appeal, which he had, was not adequate, because by the time the appeal would be reached in the ordinary course of law the structure would be completed, and the damage worked.

LIABILITY FOR ASSAULTS OF EMPLOYES AND OTHERS—DUTIES IMPOSED BY CONTRACT OF CARRIAGE—ON EMPLOYES—WHEN CONDUCTOR MAY USE FORCE.

Birmingham Railway & Electric Co. v. Baird (Ala.), 30 So. Rep. 456. May 31, 1901.

The law is well settled, the supreme court of Alabama says, that for torts, such as assaults and the like, committed by the agents or employes of a common carrier upon persons who are not passengers the employer is not liable, unless the act was in a sense in the line of duty imposed by the employment.

But as between the carrier and its passengers an entirely different rule prevails. As to them the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort and peace throughout the journey. And this same duty is, of course, upon the carrier's agents. They are under the duty of protecting each passenger from avoidable discomfort, and from insult, from indignities, and from personal violence. And it is not material whence the disturbance of the passenger's peace and comfort and personal security or safety comes or is threatened. It may be from another passenger, or from a trespasser or other stranger, or from another servant of the carrier, or from the particular servant upon whom the duty of potection peculiarly rests.

In all such cases the carrier is liable in damages to the injured passenger. And it is of no consequence, when the wrong is committed by the carrier's own servant—even that servant particularly charged with the duty of conserving the passenger's well-being en route—that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any duty; but is utterly violative of all duty, and apart and away from the scope of employment as that term is understood in the class of cases first above referred to. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employement; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice towards the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, the court thinks, the true doctrine or principle; and while there are adjudications against it, the great weight of authority supports it.

Of course, the court further says, a conductor has the right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled, and he must be without fault. To be sure, he need not retreat from his car. And he may assault a passenger when necessary to protect other passengers from assault, using no more than necessary force, and this may become a duty—indeed, it is a duty whenever it is a right. But he cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and, all the more, he cannot assault a passenger for abusive words, or in revenge or punishment, under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery, or in rightfully ejecting a passenger, who, by his conduct towards other passengers, has forfeited his right of carriage, the carrier is liable. The fault of the passenger, short of producing a necessity to strike in self-denfense, will neither justify the conductor in striking, nor relieve the carrier from liability for his act. Possibly, such fault could be considered in mitigation of damages.

INJURY OF PASSENGER BY ELECTRIC SHOCK—EVIDENCE OF SAME—OF NEGLIGENCE.

Buckbee v. Third Avenue Railroad Co. (N. Y. Sup.), 72 N. Y. Supp. 217. Oct. 4, 1901.

A shock occasioned by contact with an electric current, the second appellate division of the supreme court of New York holds, must be regarded as a direct physical and personal assault, for which a negligent defendant may be held liable. And it affirms in this case a judgment for damages for injuries alleged to have been sustained by a passenger in stepping on or over the metal door sill at the rear of the car as she left the same on becoming alarmed at the sight of flames shooting from the controller box. The car was operated by electricity communicated from underground, and one witness testified that the flames extended beneath the car its entire length. The appearance of the flames was preceded by a loud report or explosion. Another witness testified that the flames started in front, and went underneath the car, burning a long while. The plaintiff herself testified that she received an electric shock, and described the sensations she felt indicating it. At the time, she was in perfect health and vigor, and a physician who examined her within two hours of the occurrence, after stating her condition then, testified that an electric shock received as claimed would be an adequate cause for it, although he admitted that a blow or any injury in the lumbar region might also be an adequate cause, but said that he found no evidence of such injury. Two other physicians, who made examinations, gave evidence of the existence of a permanent injury, which they said an electric shock received as claimed would be sufficient to produce. The court holds that this was abundantly sufficient to establish a prima facie case of injury resulting from electric shock. Then, it holds that the company's negligence was not only established by this evidence, but also by proof that the phenomenon described could not have existed if the electrical appliances of the car were in proper shape. It is true, there was evidence that the car, after the accident, was used the same day on four through trips without further harm; but there was no evidence of any subsequent inspection, and no direct evidence that it was not out of order. Under these circumstances the positive evidence was not sufficient, the court holds, to justify the assumption that the company was free from blame as matter of law.

LIABILITY FOR DAMAGES OF POWER HOUSE TO ADJOINING PROPERTY—AS TO ITS BEING A NUISANCE.

Chicago North Shore Street Railway Co. v. Payne (Ill.), 61 N. E. Rep. 467. Oct. 24, 1901.

The supreme court of Illinois affirms here a judgment for $2,000 damages to property from the establishment on adjoining premises of an electric power house for the operation of this railway. It says that such structures of a railroad company, erected in pursuance of lawful authority for the uses of its road, are permanent structures. This company, acting within its charter, had a legal right to maintain its power house at that place, and the party suing had no lawful right to interfere or compel a change. In such a case, in legal contemplation, all damages which will be sustained as the effect of the act are sustained immediately, and the measure of damages is the depreciation in market value. If the president or some other individual had built the power house, and operated it himself, and sold the power to the company, the use would have been a private one, but the thing would have been a nuisance, and the owner of it liable as an individual. At common law the power house and the business carried on adjoining the dwelling house of the party suing would be such a nuisance as could be remedied by an action on the case for damages, or, perhaps, by an injunction against its continuance. If, however, the erection and maintenance of the power house were things which the company's charter authorized it to do in the operation of its road, and they were performed in a reasonably skillful and proper manner, although of such a character as to injure and annoy the party suing as the adjacent property owner, they would not constitute a nuisance, and could not be abated as such. Nevertheless, the company would be liable for the damages to the same extent and under the same rules as though the power house were a nuisance. The charter of the company does not, under the present state constitution, take away from the adjoining owner the right to recover for the noise, jarring, smoke, and disturbance resulting from the power house.

DUTY TO PERSONS ON PRIVATE RIGHT OF WAY WHEN THROWN OPEN TO THE PUBLIC.

Liekens v. Staten Island Midland Railroad Co. (N. Y. Sup.), 72 N. Y. Supp. 162. Act. 4, 1901.

People making use of thoroughfares which are thrown open to the public, and upon the surface of which street railroads are being operated, the second appellate division of the supreme court of New York holds, may properly assume that the way is a public highway, and that it is subject to the same rules of law, in so far as the active duty of the street railroad company is concerned, as though in fact it were a public highway. They may use such public way in the manner customary upon other highways similarly situated, in the absence of notice to the contrary by the owners of the fee or legal title; and the street railroad company is bound, as in the case of other highways, to exercise a reasonable degree of care to prevent injury to persons so using such ways. The company, owning the way, as where it is on its purchased right of way, may protect its right of way for its cars by fencing it in, or by erecting barriers of any kind; but so long as it presents to the public an open street, differing in no essential particular from any other public highway, it cannot, consistently with law, be relieved of the duty of exercising the same degree of care which would be incumbent upon it if the way was in fact a public highway. Here was a passenger in a coach, which was traversing what the court says the company held out to him as a public thoroughfare, and which it admitted he had a right to travel, except that it undertook to say that, inasmuch as it was on a right of way which it owned leading to a summer resort, in so far as its tracks were concerned, its right was exclusive, and that upon that portion of the way it owed him no duty, or at least none other than not to wantonly, willfully, or intentionally injure him. But such a rule the court declares would be shocking to the sensibilities of the community, and would permit transportation companies to invite people to public resorts upon the private property of the corporations, and to slaughter them without any adequate responsibility. This party was not a mere licensee upon the private premises of the company.

CONTRACT SATISFIED AS TO THE TIME OF BEGINNING OPERATION OF ROAD—MAY DIG DITCHES ON RIGHT OF WAY TO RAISE ROADBED—POWER TO RECEIVE CONVEYANCE OF RIGHT OF WAY NOT DECIDED.

St. Louis & Belleville Railway Co. v. Van Hoorebeke (Ill.), 61 N. E. Rep. 326. Oct. 24, 1901.

For $1 in hand paid, and the benefits to be derived from the construction and running through their land of a double track electric railway, and for the further consideration of the performance of certain conditions set forth, the owners of a tract of between 70 and 80 acres of rather low land contracted to convey a right of way 100 feet wide through said land. One of the conditions of the contract was that on or before May 1, the company should construct and operate continuously, regularly, and daily a double track electric railway on said right of way. It was conceded that the road was finished and in operation May 20. Moreover, the evidence showed that the road was operated as early as May 1, and before that time, by the running of one or more construction cars upon the track, which construction cars also carried passengers. Yet, on May 15, the landowners gave notice declaring the contract void. But the supreme court of Illinois, after a careful examination of the evidence, thinks that the company complied with the terms of its contract. It says that these parties permitted the company to take possession of the ground, which they agreed to convey to it for a right of way, and to spend an immense amount in grading the road, in laying rails, in building a power house, in erecting poles necessary to hold the wires used in the construction of an electric railway, in stringing the wires, and in otherwise perfecting the construction of the road. They permitted the company to do this for 15 days after they knew of what they claimed to have been a default on its part. Under these circumstances, it certainly would be a great wrong and injustice to the company to enforce a forfeiture of the contract.

Nor does the court think that there was any excuse for the landowners refusing to comply with their contract to convey the right of way by the manner in which the company had constructed the road thereon, or by its having so made use of that portion of the right of way lying outside of the railroad bed, by making excavations or digging ditches to get dirt for the construction of the roadbed, as to injure the balance of the tract of land. That is to say, it is of the opinion that the elevation of the roadbed from two to four feet above the surface of the ground, in this case, and the settling of water in the places where the excavations for dirt to do this with were made, were not circumstances which would justify the landowners in refusing to comply with their contract. It accords to the company the same rights in this respect that it would grant to any railroad company.

The court wants it understood, however, that it was assumed by counsel on both sides that this company had power to receive a donation or conveyance of a right of way, and to condemn land for such right of way, and that it passes no opinion upon that subject, as it was not a contested question, but when a disputed question arises as to the existence of such power, it does not intend to be cut off from considering it by anything here said. It merely holds that, assuming such power to exist, because counsel on both sides seemed to concede it in this case, it does not think that the company had so failed to perform its contract, or had performed it in such an improper manner, as to justify the landowners in refusing to execute a deed to it. The corporation was organized, under the general railway act of Illinois, for the purpose of building and operating a double track electric railway between the cities of East St. Louis and Belleville.

RIDING ON REAR BUMPER—WARNING AND PERMISSION OF CONDUCTOR.

Nieboer v. Detroit Electric Railway (Mich.), 87 N. W. Rep. 626. Oct. 22, 1901.

A man desiring to take a car at about 6 o'clock p. m., under the plea that it was crowded, climbed upon the rear deadwood or bumper. Two others also got on it. Then, the car stopping at a point evidently not anticipated by the motorman of the car behind it, the latter struck it. The blow was not a severe one, and no one in either car was injured but this man, who in some way had his ankle hurt, the other two referred to saving themselves by jumping from the car. He obtained a judgment for damages, but the supreme court of Michigan reverses this, ordering no new trial. It says that he was not invited to ride upon the deadwood. No custom was shown permitting him to ride there. The company had instructed its employes not to permit it. It was not intended or sanctioned for the use of passengers. It needs no argument to demonstrate that the position was a dangerous one, and never intended as a place for passengers to ride. There was neither an express nor implied assent for him to ride in this dangerous position. The conductor advised him not to ride there, by telling him that he better get off and wait, or get inside. This language cannot be construed into an invitation. It was a busy time. The conductor was not called upon to stop and put him off. He had done all that was required in warning, if, indeed, he needed any warning. He knew that, if the car was crowded, others were coming within two or three minutes, which he could have taken, and the testimony showed that there was room on the next car. He voluntarily, and without invitation or permission, chose to ride in a dangerous place, rather than attempt to get inside or wait a few minutes for another car. His negligent act was a continuing one, and directly contributed to the injury. When a place is one not provided or intended for passengers to ride upon, and is in itself dangerous, the employe who assumes to permit a passenger to ride in such a place acts without authority, unless such authority be shown expressly or by common custom.

INJURY OF PERSON ATTEMPTING TO BOARD CAR WHEN IT FIRST REACHES A CROSS STREET—TIES IN STREET—NORMAL STOPPING PLACE—MOTORMAN AND NEGLIGENCE—INCREASE OF SPEED.

Schmidt v. North Jersey Street Railway Co. (N. J. Sup.), 49 Atl. Rep. 438. June 10, 1901.

The evidence showed that at the lower corner of a street, intersecting that on which ran the line of the railway, a group of intending passengers stood awaiting a car; that the plaintiff crossed to the upper corner, and stood there with others, as a car was approaching; that he waved his hand towards the car, which slackened its speed, but did not stop; that two passengers got safely on the car; that the plaintiff seized the hand rail, and placed one foot on the step, and, with the other on the ground, was dragged along until he came in contact with same railroad ties near the track, in the middle of the intersecting street, when he lost his hold, and received severe injuries. He and one witness testified that the speed of the car increased after he had taken hold of the railing; another witness for him and several witnesses for the company testified that there was no increase, but instead a decrease of the speed of the car. No proof was offered that the motorman in any way indicated that he meant to stop at the upper corner, and he testified that he did not notice any one there. Under these circumstances, the supreme court of New Jersey holds that a verdict in favor of the company should have been directed, (1) because, on the facts stated, a jury could not fairly find negligence chargeable to the company; and (2) because, with the railroad ties in full view, the plaintiff assumed all risk of injury from them when he attempted to get on the moving car.

The court says that if the company could, for any purpose, be held responsible for the maintenance there of the ties, it was quite clear it could not be chargeable with negligence towards an intending passenger; for they were not at a place where it could reasonably be supposed by any one that a car would stop to receive or discharge passengers. In the absence of any contrary indication, the place for a car to stop at an intersecting street is opposite a sidewalk. It is almost common knowledge that the normal stopping place of an electric car at an intersecting street is after crossing the roadway of that street. And the court holds that it is too much to expect that in the operation of stopping a car where there may be a miscalculation as to how far the momentum will carry it, or it may be necessary to check, and then accelerate, the speed on account of the movement of persons or vehicles in the street, that the motorman must always anticipate that persons standing on the upper corner of the street might be expecting to board the moving car.

While it is not necessarily a negligent act to get on or off a slowly-moving street car, yet, in order to charge negligence upon the person controlling the propulsion of the car, some affirmative act of his, showing a lack of due care for the probable contingency of passengers so getting on or off, must be proved. In this case, for example, it would have been necessary to prove that the motorman increased the speed of the car when he had reasonable cause to suppose that a passenger might be in the act of getting upon it.

Then, the court says that there was hardly enough proof to go to the jury of an increase, after slackening, of the speed of the car. It says that the plaintiff's belief that the car did go faster is easily understood by any one who has ever tried to board a moving car propelled by electricity. It is very easy to underestimate before the act the rate of speed which is found to exist after the attempt is made.

INJURY OF DEAF-MUTE WALKING ON TRACK ON PRIVATE RIGHT OF WAY—DUTY OF MOTORMAN—DECLARATION OF AS EVIDENCE.

Floyd v. Paducah Railway & Light Co. (Ky.), 64 S. W. Rep. 653. Oct. 17, 1901. "Not to be officially reported."

A deaf-mute was run down by a car on a street railway track built on a strip of land at the side of the highway. It appeared from the evidence and admitted facts that the motorman saw the man when 150 yards from him. He repeatedly and continuously sounded his gong, but the man walked on, paying no attention. He then blew his whistle repeatedly, and still the same result. Yet, the court of appeals of Kentucky says, he set no brake, and did not get his car under control, though he could not reasonably expect his continued soundings of the gong and whistle to be more effective than the signals he had given. When he saw the man in front of him on the track he had the right to suppose he would get out of the way, but when he saw he was unaware of the approach of the car, and that the sound of neither the gong nor the whistle affected the man, it was his duty to know what was apparent to a person of ordinary care, situated as he was, and he should have taken such steps as ordinary care required to get his car under control; for after he saw the man on the track, and perceived this, or in the exercise of ordinary care should have perceived it, after seeing the man on the track, and being aware of his danger, he could, by the exercise of ordinary care, have avoided the injury. The question of contributory negligence on the part of the man should also be submitted to the jury. Proof offered to the effect that the car track was much used by persons walking between the suburb and city which it connected the court holds was immaterial, and properly excluded, as the car track was not in the highway, and such use gave the public no right to it. A declaration made by the motorman at the scene of the injury, just after the wounded man was got from under the car, the court holds was a verbal fact directly growing out of the transaction and a part of it, and should have been admitted in evidence.

OPERATION OF CARS DURING STRIKE.

Fewings v. Mendenhall (Minn.), 86 N. W. Rep. 96. May 17, 1901.

The question as to when and under what circumstances street railway companies will be held, as to passengers, guilty of negligence in attempting to operate their cars at all during a strike of their employes, is, the supreme court of Minnesota says, an important one to them, and to the public as well. To the former, for, if they are to be held guilty of negligence in attempting to operate their cars whenever force and intimidation are used by their striking employes to compel them to suspend the running of their cars, then they must submit to such unlawful force and cease to discharge their duties to the public, or yield to the demands of the strikers, whether just or unjust. Especially important is the question to the public, for the uninterrupted operation of an efficient street car system has become a practical necessity to a large number of our urban population. They have established their homes, arranged their business and work with reference to it, and their comfort, convenience, and pleasure are largely dependent upon it. Therefore those who are charged with the public duty of operating street cars, in consideration of valuable franchises, cannot be permitted to omit the duty for any cause save the most pressing, such as the practical impossibility of discharging the duty, consistent with the further duty to exercise the utmost vigilance and care in guarding their passengers against violence, from whatever source arising, which may be reasonably anticipated or naturally be expected to occur, in view of all of the circumstances of each particular case. It then necessarily follows, the court holds, that a street railway company is not guilty of negligence, as to its passengers, in attempting to operate its cars during a strike of its employes, unless the conditions are such that it ought to know, or to reasonably anticipate, that it cannot do so and at the same time guard from violence, by the exercise of the utmost care on its part, those who accept its implied invitation to become passengers.

Again, it was contended in this case that, because the stone which injured the plaintiff, a passenger, was thrown by a third party, who was not one of the strikers, the defendant, who was operating the road as receiver, was not in any view of the case responsible for the resulting injury; that the defendant had a right to assume that all persons, except the strikers, would not only refrain from any acts of violence or lawlessness, but, on the contrary, would use their best efforts to suppress them, and hence the defendant had no reason to anticipate the act which injured the plaintiff, and therefore could not be charged with negligence for not guarding against it. But this course of reasoning the court says ignored the actual conditions existing at and before the time of the injury. If the conditions had been normal, if there had been no strike, no mobs, no excitement, and no resentment on the part of the strikers and the many who sympathized with them, the contention would be correct. The evidence, however, tended to show that the actual conditions were the reverse of those suggested, and that lawlessness, not order, reigned in and near the place of the injury. It was therefore, upon the evidence, the court holds, a question for the jury whether the defendant ought not, under the circumstances, to have reasonably anticipated violence from persons not directly connected with the strikers, and to have exercised due care to protect his passengers therefrom. Furthermore, the court holds that evidence tending to charge the defendant with notice of the conditions existing and events occurring before the plaintiff was injured was properly received.

CARE REQUIRED OF PERSONS CROSSING TRACKS—WHEN MUST "STOP, LOOK, AND LISTEN."

Tacoma Railway & Power Co. v. Hays (U. S. C. C. A.), 110 Fed. Rep. 496. Aug. 19, 1901.

It was contended here that the rule usually applied to the conduct of persons crossing the tracks of steam railroads is applicable to street railroads as well, and that the omission of the party suing to "stop, look, and listen" before crossing the track of the electric street railway was negligence as a matter of law. But the United States circuit court of appeals, ninth circuit, says that this rule, even in the case of steam railroads, is not inflexible, but is dependent upon the surrounding circumstances to a greater or less degree, and is only applicable to street railways where the attending conditions are such that reasonable care and prudence would dictate such precautions. The duties of persons with respect to steam railways and street railways are not so analogous as to be governed at all times by the same rule. The rights of the person are greater, and the dangers less, in connection with the latter; the rights of street cars, no matter by what power impelled, not being superior to those of other vehicles, save in the one instance where a vehicle is bound to get out of the way, and not to obstruct the passage of the car, owing to the inability of the car to travel in any other part of the street. The element of trespass is entirely absent in the case of a person crossing a street railway at any point, and the only care required of him is that which a reasonably prudent man would exercise, having due regard to the rights of others, and assuming that others (including the street car companies) will exercise the same care in fact, knowing that such care is imposed by municipal regulation upon the persons operating the street cars.

This assumption does not, of course, warrant such a reliance upon it as to neglect means of self-preservation, but is an element of consideration in arriving at the standard of care to govern the particular case. Here, a man, with a double team attached to a farm wagon covered with canvas, closed behind, looked up the street just as he left the grocery, but could see no car on the track for a distance of a quarter of a mile, and, after proceeding along the line of the track at a moderate speed for 400 feet, turned to cross the track, without again looking for a car, not having heard any warning signal of the approach of a car, and not believing that a car could overtake him in that length of time if running at the rate of speed (limited to 12 miles an hour) required by municipal ordinance. Under these circumstances, the court holds that the question of contributory negligence was for the jury, and affirms a judgment for damages.

LIABILITY FOR WILLFUL MISCONDUCT OR NEGLIGENCE OF EMPLOYES.

Hart v. Metropolitan Street Railway Co. (N. Y. Sup.), 72 N. Y. Supp. 797 Nov. 15, 1901.

Once the relation of carrier and passenger is entered upon, the carrier, the second appellate division of the supreme court of New York holds, is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger.

RIGHTS OF CLAIMANT WITH DISTORTED EVIDENCE—DIRECTING VERDICT—RUNNING OF CHILD ACROSS STREET—DUTY TO CHILD CLINGING UPON STEP TO AVOID INJURY—FAILURE TO SOUND GONG WHEN TURNING INTO STREET.

Aiken v. Holyoke Street Railway Co. (Mass.), 61 N. E. Rep. 557. Oct. 18, 1901.

The supreme judicial court of Massachusetts says that every one is aware that among the many suits brought to recover for personal injuries there are cases, of which, however, it does not mean to intimate that the present one was an instance, in which unjust claims are sought to be sustained by testimony which, if not wholly false or manufactured, is so colored and distorted as to tend to mislead juries and judges and to pervert justice. Yet the plaintiff in such a suit has the right to have his alleged cause of action determined by a jury, if upon any reasonable view of the conflicting evidence it can fairly be found as a fact that he was hurt while in the exercise of due care, and by the defendant's fault. If in any jury trial there seems to be danger that the jury will give an unjust verdict upon evidence which in law ought to be submitted to its decision, the proper course is to take the verdict, and then to set it aside as against the evidence, or the weight of the evidence, rather than to order a verdict. There is no justification for the latter course in a suit in which it does not appear that any wrong verdict has ever been taken.

The court further maintains that it cannot be held, as matter of law, that for a child of six or seven years to run across a street on his way home from school is of itself negligence. Here the boy in question was about six and one-half years of age, and testified that his attention was attracted by the whistle of steam cars which were crossing the same street at a more distant point; and the court holds that neither the fact that he was running, nor that he did not see the electric car, precluded a finding that he was in the exercise of such care as might be expected from an ordinarily prudent child of his years.

Again, the court holds that while at play he carelessly ran into the car, and if in attempting to save himself from the consequences of such a collision he found himself upon the car, the company could not rightfully disregard his peril, if informed of it, and run its car as if nothing had occurred. There was abundant testimony that before the boy was finally thrown from the car he was upon the step, in a place of comparative safety, very near and in full view of the motorman, and requesting the motorman to let him off, and that the motorman, instead of stopping or attempting to stop the car, increased its speed, and so caused him to be thrown to the ground and run over. To be sure, this testimony was contradicted. But whether it was true or not was a question for the jury. If it was true, and if the boy was not a trespasser attempting to steal a ride, to disregard the peril of a child of less than seven years of age, who by his own careless collision with a street car was clinging, frightened, upon the step and to the handle of the car, instead of attempting to comply with the child's request, was a course of conduct of such a clear and direct tendency to inflict serious injury as to be actionable, when practiced by one traveler towards another in a public street, where both were lawfully present.

Then there was evidence which would justify a finding that the car turned into the street across which the boy was running without sounding the gong, and at a speed variously estimated at from two to five miles an hour. Whether due care on the part of the company would require it to give warning of the entrance of the car into the street by ringing the gong, the court holds, was a matter peculiarly within the province of the jury to determine. It could not be said, as a matter of law, if the gong did not sound, that the omission was not negligent.

LEAVING SIDE BAR UP ON OPEN CAR.

Whitaker v. Staten Island Midland Railroad Co. (N. Y. Sup.), 72 N. Y. Supp. 814. Nov. 15, 1901.

An instruction given the jury in this case left it free to find that the company could be deemed negligent simply because it did not have the side bar or guard rail on the left side of the open trolley car in which the party suing was standing as a passenger lowered at the time when she fell off or was thrown off the car at or near 1an abrupt curve, since it was tolerably plain that she could not have fallen off if the bar had then been down. This, the second appellate division of the sureme court of New York says, would have been correct if the purpose of providing the bar had been to guard against the falling out of passengers. But, in view of the uncontradicted evidence that such was not the purpose, it was error, the court holds, to tell the jury, as it was told, in substance, that it might infer otherwise, and hold the company responsible for the passenger's fall solely because the bar was up, instead of down.

PRESUMPTION OF TRACKS BEING IN PUBLIC STREET—RIGHTS OF COVERED WAGON ON TRACKS.

Vincent v. Norton & Taunton Street Railway Co. (Mass.), 61 N. E. Rep. 822. Nov. 25, 1901.

The suggestion that there was no evidence that the place where the accident in question, the running down of a wagon, happened was a public way, the supreme judicial court of Massachusetts says was plainly a mere afterthought, and discredited the company's whole case The court assumes that tracks might be laid over private land belonging to the company so that it would be a trespass for others to drive upon them, but of course, it continues, such a case is very unusual, and in the absence of special evidence a jury would be warranted in presuming and finding that street railway tracks were laid in a public street.

The wagon was a covered baker's wagon, and the rear of it was closed with drawers and boxes. It was not negligence, the court holds, to drive such a wagon in the public streets, even those containing street railway tracks. It was not negligent or unlawful to drive upon the tracks. The fact that the horse was walking made the case no worse. As against a car coming up behind him the driver would have done his duty by getting off the track when he knew of its approach. But the driver did not know of it. If the bell was rung those in the wagon testified that they did not hear it. They were not bound to keep an impossible watch upon the rear. The company could not run them down from behind under any ordinary circumstances without negligence or willful wrong, and this they may be supposed to have known.

INJURY BY JERK OF PASSENGER GOING ON STEP TO ALIGHT WITHOUT KNOWLEDGE OF CONDUCTOR.

Sims v. Metropolitan Street Railway Co. (N. Y. Sup.), 72 N. Y. Supp. 835. Nov. 15, 1901.

Before an agent of a company can be said to be negligent in not stopping a car at a crossing, the first appellate division of the supreme court of New York thinks that the passenger must in some way indicate to the agent that he wishes to stop. Nor can it see that where the conductor was collecting fares, and had his head turned away when the passenger stepped down on the step, that this action of the conductor would justify an inference of negligence. And it holds that if a passenger voluntarily places himself upon the step of a car approaching a crossing when the car is in motion, and is thrown off by the increase of the speed of the car, which happens before he has indicated to any of the agents of the company that he intends to alight, such a starting of the car, unaccompanied by any other fact, cannot be the foundation of a charge against the company of negligence.

INJURY OF WORKMAN IN TRENCH ALONG TRACK, FROM PUTTING HIS HAND UNDER CAR.

Nolan v. Metropolitan Street Railway Co. (N. Y. Sup.), 72 N. Y. Supp. 501. Nov. 8, 1901.

A bricklayer while engaged in laying terra cotta conduit pipes for electric wires in a trench about four feet deep along, and extending partially under, certain street railway tracks, put one of his hands on one of the rails of the track as a car was passing, and a portion of the car ran over it. This, however, the first appellate division of the supreme court of New York holds did not render the street railway company liable. It points out that the man was in a place of safety when the car commenced to pass over him; that he was familiar with the character of the work, and of the risks incident to it; that he had been engaged in the same kind of work before, and had observed the passing of cars on that very day; that, if he had not, it must have been obvious to him that, if he placed his hand upon the rail while a car was passing, he would sustain injuries; and it says that the rule is well settled that one who, knowing and appreciating a danger, voluntarily assumes the risk of it, has not, if injured, a just ground of complaint.

ALL INTERSECTIONS OF STREETS ARE CROSSINGS UNDER ORDINANCE REQUIRING SOUNDING OF GONG.

Schneider v. Market Street Railway Co. (Cal.), 66 Pac. Rep. 734. Nov. 9, 1901.

A city ordinance requiring a bell to be rung or gong sounded as a car approaches the limit of 25 feet from a street crossing, the supreme court of California holds applies where the intersecting street does not pass beyond that on which the car is running, but terminates it In other words, a junction of two streets is a street crossing under such an ordinance, the term, according to its common use, including, the court says, all intersections of streets, and applying equally though one of them may terminate at the point of intersection.

BOY KICKED OFF CAR BY MOTORMAN KILLED GOING ON OTHER TRACK.

Pinder v. Brooklyn Heights Railroad Co. (N. Y. Sup.) 27 N. Y. Supp. 1082. Nov. 22, 1901.

Apparently without any justification, a motorman kicked off the car a bright boy of fourteen who was riding on the front platform. The boy fell, screaming, upon his back; then picked himself up, turned, and walked slowly and lamely across the other track, where he was struck by a car coming from the opposite direction without warning and at a very high rate of speed, receiving fatal injuries. The second appellate division of the supreme court of New York holds that a nonsuit based chiefly upon the ground that there was no evidence given to prove that the boy looked or listened before he attempted to cross the track was erroneous, and that the question of contributory negligence should have been submitted to the jury. It says that if the act of the motorman, in the opinion of the jury, created a condition by which the boy was caused to walk at once in front of the oncoming car, without realizing what he was doing, or appreciating the danger he was incurring, the effect would be quite similar in principle as if the motorman had kicked him over to the other track, and directly in front of that car. It was apparent that practical men might reasonably conclude that the boy exercised all the caution which was to have been expected of him under the circumstances created by the company's wrongful act of violence, and that therefore contributory negligence could not be predicated as matter of law. If he was blameless, in a legal sense, for his act in stepping in front of the oncoming car, then the jury might properly determine, under suitable instruction, that the act of the motorman in kicking him off the first car was negligence imputable to the company, wholly independent of any question of negligence in the operation of the car by which he was killed.

FRANCHISE PART OF REAL ESTATE AND NOT TAXABLE SEPARATELY.

Dallas Consolidated Electric Street Railway Co. v. City of Dallas (Tex. Civ. App.), 65 S. W. Rep 201. Oct. 23, 1901. Rehearing denied Nov. 27, 1901.

The franchises of a street railroad appurtenant to the use of its property, the court of civil appeals of Texas holds, are a part of its real estate and not subject to a separate tax. Moreover, here it thinks was an especially strong case for the application of this doctrine because not only was the whole of the property, real and personal, owned by the street railway company, taxed, but, in addition for the very privilege sought to be taxed, a large "bonus" or "franchise tax" was being annually paid, independent of what the privilege to operate the railway might be worth.

CONSENTS CAN BE USED BUT ONCE AS A BASIS FOR MUNICIPAL ACTION.

State (Currie, Prosecutor) v. City of Atlantic City (N. J.), 50 Atl. Rep. 504. Nov. 15, 1901.

Under the acts regulating the construction and maintenance of street railroads in New Jersey, approved, respectively, May 16, 1894, and April 21, 1896, before a railway company can lay its tracks in the streets of a municipality it must have the municipal consent and also the consent of a majority in lineal feet of the abutting owners. Before the municipal permission can be obtained by the passage of an ordinance expressing its consent, there must be on file with the clerk of the municipal body the required consents of such majority in interest of the abutting owners. And the court of errors and appeals of New Jersey holds that when upon the filing of the necessary consents of the abutting owners the city council or other governing body has once regularly acted thereon, by the passage and approval of a valid ordinance or resolution giving or refusing such municipal consent, the council or other governing body becomes functus officio, or as having fulfilled its office, so far as the pending application is concerned, and the consents of the abutting owners, thus acted upon, cannot be the basis of further municipal action upon a second application. Upon the question as to whether the consent of an abutting owner, after being once filed, can be withdrawn or revoked before final action the court expresses no opinion. It observes, too, in passing, that the consents which it had been considering were, as it appeared, recorded in the county clerk's office soon they were obtained; but this, it says, was not a statutory requirement, and such recording could give to them no additional force or validity.

PARK OWNER HAS NO RIGHT OF ACTION FOR DAMAGES FOR REMOVAL OF EXTENSION.

Barney v. Indiana Railway Co. (Ind.), 61 N. E. Rep. 194. Oct. 3, 1901.

An owner of a driving park having advanced the money to buy the rails, and made a donation of $500 out of the money so advanced, to secure an extension of a street railway line to his park, the company agreeing to "place said rails, lay said track, and operate it and have it ready for operation as early as" a certain date, the supmere court of Indiana holds that such park owner had no cause of action for damages for the subsequent removal by the company of said extension, as the right to determine how long it should operate the road remained with the company, so far as he was concerned, the contract not fixing any definite time during which the company should operate the road.

INJURING CHILD OF POOR PARENTS.

Cotter v. Lynn & Boston Railroad (Mass.), 61 N. E. Rep. 818. Nov. 26, 1901.

A child three years and ten months of age, whose parents lived in a tenement house on a street in which there was a line of electric cars, having been allowed to go down into the yard to play, where the gate was always open, and left unattended and unobserved by the mother for an hour or more, the supreme judicial court of Massachusetts holds that, there being no pretense that the child herself was using the care of a prudent adult, she could not recover for injuries sustained in being run down by a car, while trying to run across the street directly in front of it.

There being no evidence that the child used the care that would be expected of an adult, the court holds that, therefore, if there was negligence on the part of her parents in allowing her to be where she was she could not recover damages. While the limited powers of the poor must be taken into account as a general fact in drawing the line at which the company's responsibility shall begin, still, the court says, the other side must be considered also before it, a third party, is made responsible for an accident, and this responsibility does not follow of necessity from the fact that the parents did the best they could. There is a certain minimum of precaution against the dangers into which infants will wander, which must be taken if another is to be made to pay.

Of course when the case gets near the line which divides those instances in which it can be ruled as matter of law that the parent was negligent from those in which it can be ruled that due care was shown, it is left to the jury. But in the cases most like this in which a jury has been called, the court says the precautions were greater, or the danger was less obvious and not so great, and the time shorter during which the child was left to itself.

DUTY TO LOOK AND LISTEN FOR CAR DEPENDS UPON CIRCUMSTANCES—UNFAMILIARITY WITH STREET OF PERSON INJURED—PEDESTRIANS NOT ALWAYS TO BE DEEMED IN PERIL.

Russell v. Minneapolis Street Railway Co. (Minn.), 86 N. W. Rep. 346. May 31, 1901.

The supreme court of Minnesota says that it is not, as a matter of law, negligence for a pedestrian to cross a street railway track (at least, within the populous part of the city) without looking and listening for an approaching car. Whether the failure to look and listen be an act of negligence must be determined from all the circumstances of each particular case, guided by the rule of ordinary care and prudence. If a person by the exercise of such care could have discovered an approaching car and avoided the accident, and he failed to do so, he cannot recover. So the question in every case is one of ordinary care. Failure to look and listen might be conclusive, or at least very strong, evidence of negligence in one case, and in another of no particular controlling force at all. The ultimate determination of the question must depend largely in each case on the surrounding circumstances.

The mere fact that the plaintiff in this case was not familiar with the location of the street car lines in Minneapolis, and did not know at the time whether a line was located and in operation upon the street she was crossing, the court holds, was not conclusive that she was not negligent. It says that whether an injured party is familiar with the location where an accident happens, and with the particular danger, is always an element to be considered in determining whether he was guilty of negligence, but it is not conclusive one way or the other. The rule is that if the person have no actual knowledge of the danger causing his injury, and could not by the exercise of reasonable care have discovered it, he cannot be said to be guilty of contributory negligence. But if ignorant of the danger, and the exercise of reasonable care would have made it known, and there be a failure to exercise such care, he is chargeable with negligence, and to the same extent as though perfectly familiar with it.

Furthermore, the court hold that the mere fact that a person is upon a street upon which runs a street car line is no evidence that he is in a position of peril. The motoneer in charge of a street car has the right to presume that pedestrians will exercise due care for their own safety and protection, and is not required to assume that every person in front of his car, at a considerable distance, will fail to exercise that care, or is in a position of peril.

DUTY OF EMPLOYES TO REMOVE YOUNG CHILDREN FROM PLATFORM—WAYS TO DO IT— FORMER LANGUAGE EXPLAINED.

Levin v. Second Avenue Traction Co. (Pa.), 50 Atl. Rep. 225. Nov. 8, 1901.

The supreme court of Pennsylvania says that when this case was up before (194 Pa. 156, 45 Atl. 134) it held: "When the motorman discovered the boy on the platform of the car, it was his duty to stop, and take him inside, or put him off." This simply followed Railway Co. v. Caldwell, 74 Pa. 421, and what the language clearly means is that when a child of years so tender that negligence cannot be imputed to it is found by a conductor or motorman on the patform of his moving street car, his duty is to remove it from its peril. This can be done by stopping the car, and putting it off, or by taking it inside. In saying, "The youth of the boy exempted him from the charge of being a trespasser, in the legal significance of the word (Barre v. Railway Co., 155 Pa. 170, 26 Atl. 99), and no negligence was imputable to him," in 194 Pa., 45 Atl., above, the words mean that the boy was not a trespasser to whom no duty was owed, and they ought to be so understood. In Enright v. Railroad Co., 198 Pa. 166, 47 Atl. 938, cited by counsel for the traction company, while it is true the boy was held to be a trespasser upon the train of the railroad company, this court also decided that its employes could not eject him, or cause him, by fright or fear, to leave the train, while in rapid motion, so as to endanger his life; and that it was the duty of the defendant company and its employes not to eject him. The duty of a street railway company's conductor or motorman is to refuse to permit a child five years old to be on the platform of his moving car, and, if it gets there without permission, through the oversight of the company's employe, the duty of the latter, as soon as it is discovered, is to remove it from its position of danger. Failure to do so is negligence.

CATCHING HOSE TO WHICH MEN ARE HARNESSED FLUSHING PAVEMENT.

Laschinger v. St. Paul City Railway Co. (Minn.), 87 N. W. Rep. 836. Nov. 8, 1901.

Three city employes were harnessed to the nozzle end of a 5-inch hose 200 feet long used in flushing asphalt pavement Their duty was to pull the hose, which was placed upon rollers, and handle the nozzle. A fourth employe was to keep the hose as straight as practicable, and in from the street car track. But a bolt under the rear step of a passing car caught one of the rollers at a point some 40 feet from the three men mentioned, whereby they were thrown into the air and to the ground, and injured. There was evidence on their behalf tending to show that this result was due to negligence in running the car along the street at a dangerous rate of speed, while the company, on the other hand, offered evidence to the effect that the car was going at a rate of speed not to exceed four to six miles an hour.—a safe rate of speed. The supreme court of Minnesota holds that the evidence presented a question for the jury and sustained a verdict for damages in favor of each of the three men.

DUTY TO STOP AT REGULAR CROSSINGS AND ON OCCASION TO BACK UP TO SAME FOR PASSENGERS.

Jackson Electric Railway, Light & Power Co. v. Lowry (Miss.), 30 So. Rep. 634. Oct. 28, 1901.

A street railroad company, the supreme court of Mississippi holds, is under a duty to the public to stop at its regular crossings, on a seasonable signal. to receive those desiring to take passage. It cannot avoid this duty by any practice or rules of its own. Its rules must be reasonable, and an absolute contrary rule would be unreasonable. It is unreasonable for it to have a rule that where its cars stopped beyond the crossing, they should not be backed to the proper place, in order to receive the person signaling, under all circumstances. Where the distance is short, and the road good, and no inconvenience given the proposed passenger, it is not meant to hold that such a rule might not be held proper. But it is highly improper for it to be made, or obeyed, to apply in a case like this one. Here it was a rainy night, and the road very muddy, and the stop 20 or 40 feet beyond the brick crossing, and the passenger, as known to the operatives, with 7 blocks to walk unless he got passage. As to damages, the court holds that this case was one in which exemplary damages could be recovered, it further appearing that when the car was on its return trip the passenger boarded it and paid his fare to get the names of those in charge of it and was treated insolently by the conductor and made sport of by him when he alighted.

MALICIOUS ASSAULT OF CONDUCTOR ON PASSENGER HELD TO JUSTIFY EXEMPLARY DAMAGES.

Lexington Railway Co. v. Cozine (Ky.), 64 S. W. Rep. 848. Oct. 23, 1901.

A passenger requested to be left off at a certain place. As the car approached the place, he signaled to the conductor to stop. Failing to attract his attention, he reached up to pull the bell cord, but by mistake got hold of the wrong cord, and rung up a fare. The conductor thereupon went back and asked what he rang the bell for, and said, "You owe me a nickel." The passenger responded, "I have already paid you, but I will give you another nickel," and shoved it along the seat, and at the same time arose for the purpose of alighting. The car, however, did not stop, and he remarked to the conductor, "If you do not stop the car, I will ring the bell again." At the time he said this he was holding to the side of the car with both hands, and standing on the footboard. The conductor responded, with an oath, "No, you won't," and immediately struck him twice in the face, bruising one eye and cutting a gash in his face. The passenger was a cripple, and partially paralyzed in both legs from the knees down, and was making no effort at all to assault or otherwise injure the conductor. The jury was instructed that, if they believed from the evidence that the assault made upon the passenger was inspired by malice on the part of the conductod towards the passenger they might allow the latter punitive damages, by way of punishment. This meets with the approval of the court of appeals of Kentucky, which affirms a judgment against the company. It says that while there was nothing in the record to show that the company either authorized or approved the conduct of the conductor in this matter, yet he was clearly acting in the line of his employment at the time of his brutal and unjustifiable assault upon a passenger who was entitled to his care and protection, and the case was clearly brought within the rule of law authorizing the instruction.

DUTY OWED TO EMPLOYES IN FURNISHING APPLIANCES—DEFECTIVE BROOKLINE—RELYING ON MANUFACTURER FOR INSPECTION.

Murphy v. Coney Island & Brooklyn Railroad Co. (N. Y. Sup.), 73 N. Y. Supp. 18. Nov. 22, 1901.

A lineman engaged in fastening span wires into a brookline or turn-buckle received a severe shock of electricity. Subsequent to the accident it was found that the brookline had leaked, and thereby had become defective, though there was no evidence that the defect was visible. At the close of the testimony it was held that there was not sufficient preponderance of any violation of duty upon the part of the company to justify a verdict, and that as it had bought the brooklines from a reputable manufacturer, who assumed the duty of inspection, the company was not negligent in failing to make another test. The second appellate division of the supreme court of New York holds that this was error, and reverses the judgment rendered in favor of the company, granting a new trial, upon the ground that the testimony required the submission of the case to the jury, but with the statement that it expresses no opinion as to the liability of the company.

The obligation of the company, the court holds, was to furnish its employes good and suitable appliances, and to use reasonable care to keep them so. The master's duty in choosing materials for his servants is to use care similar to that which a man of ardinary prudence in similar business, acting for his own safety, would use in choosing such materials for himself, were he doing the work. The rule is the same whether the master buy the appliance ready-made, cause it to be made, or purchase the materials and make it. Of course, it says, it does not hold that the obligation upon the master requires him always to inspect appliances, so that proof of omission to inspect is proof of negligence. But there were two features in the testimony in this case which in its opinion, made the question one for the jury: First. There was no proof whatever that the manufacturer ever made any tests of the brooklines. The testimony only went to show that the manufacturer made a verbal promise that he would test them. Second. There was testimony that practicable tests could be made by the company of the brookline in its finished form, which would have revealed the defect in question, and that the defect was not inherent in the material of construction, but was due to a leakage from the appliance. It was necessary for the lineman to connect the brookline with the span wires, and he had a right to rely upon the fact that the master had used due care in furnishing an apparatus the very purpose of which was insulation.

SUFFICIENCY OF COMBINED CONSENTS OF COMPANIES THAT MERGE—NATURE OF CONSENTS —EFFECT OF SALES OF PROPERTY.

Adee v. Nassau Electric Railroad Co. (N. Y. Sup.), 72 N. Y. Supp. 992. Nov. 15, 1901.

Two different companies having each obtained a number of consents for the construction of a street surface railway on a certain street, but neither company alone having sufficient, the second appellate division of the supreme court of New York holds that, on the merger of one of the companies into the other, the latter, with the combined consents of the two companies, which were from different parties, and were in the aggregate prima facie sufficient, was, upon the face of the papers, justified in entering upon the street and laying down its tracks. Nor does it consider that in this case, an action brought by an owner of property abutting on the street to enjoin the construction and operation of the road on the ground that the required consents had not been obtained, that conformity of the merger to law could be inquired into, that being a question to be dealt with in an action brought for that particular purpose, if at all. Neither does it consider that the rights of the surviving company were prejudiced in the matter because it had pending in the courts an action which it brought before the merger to get the authority through commissioners to construct the road on the ground that it was unable to secure the necessary consents.

Furthermore, the court says that if it reads and catches the spirit of the state constitution and statute aright, these consents are not mere licenses to be revoked at will, or by the transfer of the property before the construction of the railroad; nor do they contemplate a conveyance of real estate. If either of these two companies failed to record the consents it obtained, the sale and conveyance of the properties on which these consents were based did not invalidate the consents. The most that could be claimed would be that the new owners, having purchased without notice, would not be estopped to assert any property rights which might have come to them under their deeds as against the company. Continuing, the court says that if the surviving company had neglected to record its consents until the rights of third parties had intervened, it had only itself to blame, and it might not complain, perhaps, if it was called upon to pay for the property rights of subsequent purchasers in good faith without notice; but the fact that parties, strangers to the record in this case, might have a cause of action against the company for taking their property for a public purpose without just compensation, could not give the party suing in this case any rights in an action brought to restrain the company from constructing its railroad under the consents which had been given in writing by the property owners. In other words, the party suing could not be permitted to deprive the company of its property rights in these consents, which the statute declares "shall be effectual for the purposes therein mentioned," because some one else may have been deprived of his property in the highway.

The consent, if valid when made, is the consent of the owner of the property, and, in contemplation of law, vests a certain property right in the company to which the consent is given, which cannot be devested by any subsequent transfer of the property, although the purchaser without notice may acquire the full right to demand compensation for any injury to his rights which may follow from the construction of the road. So, the party suing, never having consented to the construction of the road, assuming him to be the owner of the fee (title) of the street in front of the premises, might maintain an action to compel the payment of damages, but he had no right to prevent the construction of the road under the consents given by the owners of one-half in value of the abutting property.

COLLISION WITH PATROL WAGON AT CROSSING.

Decker v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 72 N. Y. Supp. 229. Oct. 11, 1901.

A policeman in charge of a heavy patrol wagon, which another policeman was driving, was injured in a collision with a car at an intersection of streets. The patrol wagon was going at a brisk trot, one of the horses galloping, down grade, the ratchet bell ringing. When the horses reached the curb line, the car was near the crossing, perhaps from 30 to 100 feet away, running at about the usual rate of speed, and the driver of the patrol wagon whipped up his horses, and attempted to pass in front of the car. The result was the collision, the car striking the patrol wagon back of the rear hub. Upon this evidence, the second appellate division of the supreme court of New York affirms a judgment for damages against the company. It says that this accident occurred at a street intersection, where the rights of the parties were equal. The driver of the patrol wagon, whose negligence might, perhaps, be imputed to the policeman suing, was bound only to the exercise of that degree of care which a reasonably prudent man would or should have exercised in like circumstances; and it is of the opinion that the evidence supported the conclusion that the one suing did exercise the degree of care which was fairly to be expected of the driver of a patrol wagon. He was ringing the ratchet bell. He was driving in response to a call, and he had a right to assume that approaching street cars would be under control at street intersections. The jury had a right to take into consideration that the patrol wagon was acting in a public emergency; that it was, as is customary, being driven at a high rate of speed, and going down grade; and the fact that the driver used the whip, instead of attempting to stop the horses before they reached the track. It may have been prudent for the driver to attempt to pass over the tracks rather than to try to bring the team, with its heavy wagon, to a standstill within the few feet which intervened between the tracks and the horses at the moment of discovering the approaching car, and it was for the jury, with all the evidence before them, to determine whether the driver was exercising that reasonable degree of care which the circumstances demanded.

FAILURE TO LOOK FOR CAR—CARE REQUIRED OF MOTORMAN—WHAT MAY BE ASSUMED OF VEHICLES MOVING TOWARDS TRACK.

Cowden v. Shreveport Belt Railway Co. (La.), 30 So. Rep. 747. June 3, 1901. Rehearing denied Nov. 18, 1901.

Not to look to see if a car is coming before attempting to cross the track of an electric car, the supreme court of Louisiana holds, is negligence such as will preclude recovery for injuries caused by a collision with the car, in the absence of proof that the persons in charge of the car by the use of ordinary diligence might have avoided the collision. But ordinary care for a motoneer, it holds, comprehends utmost vigilance. And it doubts whether a car with a speed of 10 miles an hour could be stopped in five seconds.

Then the court says that the motoneer in question could not be supposed to have been looking in the direction of an intersecting street. He must be supposed to have devoted his entire attention to the street on which his car was running. The side streets being opposite to each other, he could not turn his face in the direction of one without turning his face away from the other. He had, therefore, to divide his attention between the two, which meant that he had to devote his entire attention to the street he was traveling on.

In other words, he, unlike the occupants of the wagon approaching the crossing from the side street, could not keep a sharp lookout at the corner.

And, even after the horses had fairly emerged from behind the corner building,—say when their heads had reached the sidewalk line,—he was not bound, the court holds, to divine the intention of the wagon to make straight for the track, and, so divining, to have recourse at once to heroic measures for stopping the car. The natural assumption in such a case was that the wagon would stop or turn aside. If a motoneer must, under penalty of negligence or worse, assume that every vehicle or every pedestrian he sees moving towards the track will keep on the even tenor of their way, and acting upon such assumption, must at once put on brake and reverse current, what becomes of rapid transit in cities?

DUTY OF MOTORMAN SEEING CHILD AHEAD ON OPPOSITE TRACK.

Jones v. United Traction Co. (Pa.), 50 Atl. Rep. 826. Jan. 6, 1902.

Where a child not quite two years old was walking on one track, the motorman of a car coming from the opposite direction on the other track, the supreme court of Pennsylvania holds, was bound to know that in her childish caprice she was as likely to cross over in front of his moving car as to go back to the pavement; and his duty, the instant he saw her, or, if exercising proper care and watchfulness, he ought to have seen her, was to stop or to so absolutely control his car as to avoid the risk before him.

LIABILITY TO ASSESSMENT FOR STREET IMPROVEMENT OR REPAVING NOT IMPOSED.

State (Dean, Prosecutor) v. Mayor, Etc., of City of Paterson (N. J. Sup.), 50 Atl. Rep. 620. Nov. 29, 1901.

While the ties, rails, and other equipment of a street railway may partake of the nature of real estate, and be liable to general taxation as such, and may be benefitted by a street improvement such as the repaving of a street, still, whether it is liable to assessment for such benefits the supreme court of New Jersey says, must depend upon the fair meaning of the governing statute. It thinks it clear, for example, that, under the act of June 13, 1898, which directs the assessment to be made in proportion to the benefits acquired by lands and real estate bordering on the street so improved, an assessment upon a street railway for benefits would be without authority.

Moreover, under the provisions of an ordinance requiring a street railway to keep and maintain the portion of a street inside its rails and for two feet outside of them in good and sufficient repair, the court holds that the company is not bound to repave within those limits with a new and different material selected by the city, nor is it liable to the expense of such repaving when laid down by the city.

FAILURE TO STOP THE CAR WHEN FIRST REQUESTED NO EXCUSE FOR GETTING OFF WHILE IT IS IN MOTION.

Campbell v. Los Angeles Railway Co. (Cal.), 67 Pac. Rep. 50. Dec. 21, 1901.

While it says there might be cases in which, by reason of a condition brought about by the negligence of the carrier, where great danger was apparent, or where the passenger was told by the person in charge of the car to jump off, or other peculiar circumstances, it would not be negligence in a passenger to alight from a car while the car was moving, the supreme court of California holds that because a motorman did not stop his car when first requested furnished no excuse for a passenger getting off while it was in motion, especially when the motorman did finally stop it in a careful manner, and with due caution to the passenger not to get off till the car stopped.

RIGHT OF ABUTTER TO INJUNCTION AGAINST CONSTRUCTION OF ROAD.

Peck v. Schenectady Railway Co. (N. Y. Sup.), 73 N. Y. Supp. 794. Dec. 31, 1901.

The third appellate division of the supreme court of New York holds that the appropriation by a street railroad company of a street in which the abutting owner has the fee or title is the taking of private property, within the settled law of that state, and that such owner is entitled to an injunction against its construction, without his alleging damage. Nor does it consider that it is rendered otherwise by the offer of the company that the court should estimate the damage which such abutting owner would suffer by reason of its appropriation of any property rights which he might have, and also offering to give any undertaking which the court might require to indemnify him for any damages he might suffer by reason of the company's appropriation of his land. To hold that the court should, against his protest, assess the damage and grant an alternative judgment, it says, would practically deprive him of his constitutional right in that state to the assessment of such damage either by a jury or by a commission of not less than three persons. Furthermore, where it is not shown that the company has taken the preliminary steps required by the statute to authorize the condemnation of private property, and it is not already in possession, the court holds that the injunction should not be denied because of the company's offering to give adequate security for the payment of any compensation which might lawfully be found to be due the owner by reason of its appropriation of the land.

WALKING ON TRACK AT NIGHT TO AVOID MUD IS CONTRIBUTORY NEGLIGENCE.

Penman v. McKeesport, Wilmerding & Duquesne Street Railway Co. (Pa.), 50 Atl. Rep. 973. Jan. 6, 1902.

A man walking on an electric street railway track at night to avoid the inconvenience arising from the muddy condition of the paved portion of the street, wherein he could have walked with perfect safety, was run down and injured by an electric car coming up from behind him. He said that he looked back several times, the last time just before he was struck; and the testimony tended to show that the bell on the car was not rung until just about the time he was struck, and that the motorman was looking back in the car at the time. The testimony in the case, the supreme court of Pennsylvania holds, clearly showed the negligence of the man, and fully justified the direction of a compulsory nonsuit, on the ground of contributory negligence, and a refusal to set it aside.

OWNER OF TRACK NOT LIABLE FOR A USER'S PASSENGER BEING STRUCK BY TREE.

Sias v. Rochester Railway Co. (N. Y.), 62 N. E. Rep. 132. Dec. 20, 1901.

A passenger on a car of a suburban electric trolley road which used the tracks of another company in the city while standing upon the platform and projecting his person beyond the side of the car was struck upon the head by a tree standing within one foot and seven inches of the rail, receiving fatal injuries. This was in the city. There was no lease of either road, and each company operated and managed its own trains of cars. And notwithstanding that the contract of the passenger for his carriage was with the suburban company, it was sought to make the other company liable for the results of the accident, the negligence relied upon to create the liability consisting in the construction of its railway in such close proximity to a tree. But the court of appeals of New York does not think that the company sued was chargeable, upon the proofs, with the neglect of any duty owing to this passenger on the other company's car, and it holds that for that reason the dismissal of the complaint was proper. It says that the company sued sustained no contractual relations to that passenger, and none such could be predicated upon a mere traffic arrangement between the two companies, which permitted the suburban company, for a compensation, to run its cars over the tracks of the company sued. The company sued had the right to construct its tracks as and where it did, and what duty of care and precaution it was under for the safe operation of its cars it owed to its passengers. How it performed its duty, the court was not informed, and it says it was immaterial here. It knew that cars could pass the tree. If there was any negligence, from which the passenger in question suffered, it could only have been in the manner in which the suburban company operated its cars upon such a track. If the construction of its cars was defective, or if their operation and management were such as not to furnish adequate security for passengers, then that company would be at fault.

COMPANY NOT INSURED AGAINST LIABILITY FOR PASSENGER BEING INSTANTLY KILLED.

Worcester & Suburban Street Railway Co. v. Travelers' Insurance Co. (Mass.), 62 N. E. Rep. 364. Jan. 3, 1902.

The street railway company was insured "against loss from liability to every person," who might, during a period of twelve months from a time named, "accidentally sustain bodily injuries while traveling on the railroad of the insured, or while in the car or upon the railroad bed or other property of the insured, under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries." The question arose whether the terms of the policy were broad enough to cover the case where a person who was a traveler on this road died instantly, and without conscious suffering, in consequence of an accident for which the company was responsible. The supreme judicial court of Massachusetts says that the diligence of counsel furnished it with no case in which a policy in the terms of this one had been construed, and it was obliged to consider the case mainly upon general principles. Its decision is in favor of the insurance company. It says that the liability insured against was that to a person who sustained bodily injuries, and such person must have a right of action therefor, either at common law or by statute. The policy could not include the case of death, for which the person never had a right of action. In that commonwealth there is no common-law liability for death. Nor is there any statute which gives a right of action for the death of a person to his executor or administrator as an asset of the estate. In all the statutes which have allowed an executor or administrator to bring an action on account of the killing of a person by the negligence of a corporation or its servants the action is for the benefit of the widow, children, or next of kin.

INJURY TO PASSENGER BY FALL OF FIRE EXTINGUISHER.

Allen v. United Traction Co. (N. Y. Sup.), 73 N. Y. Supp. 737. Dec. 31, 1901.

A passenger was injured by the fall of a metal fire extinguisher. The third appellate division of the supreme court of New York says that had this extinguisher been securely fastened, the passenger would not have suffered injury. Its fall must have been due either to negligent fastening originally or to a negligent maintenance of a fastening originally sound. The fastening was beyond the reach of ordinary interference by those going to and from the car. That an outsider should have interfered and rendered insecure this fastening was most improbable. Wherefore, without deciding the degree of care required of the company in securing this extinguisher, the court is clearly of the opinion that the circumstances surrounding the happening of the accident pointed to some negligence on the part of the company which called for its explanation and holds that it was error to dismiss the passenger's complaint.

LIABILITY FOR SAFETY OF STATION PLATFORMS.

Indianapolis Street Railway Co. v. Robinson (Ind.), 61 N. E. Rep. 936. Nov. 22, 1901.

In this case the supreme court of Indiana affirms a judgment for damages for permanent personal injuries sustained by a woman stepping upon a rotten board that broke under her, or into a hole in it, as she was crossing a platform at one of the company's stations on her way to its cars. The court says that if the situation at the time of the accident was such that the woman could not see the hole, or if there was nothing in the appearance of the decayed plank to indicate that it was liable to break, she was not negligent in stepping into the hole or upon the plank. By reason of an effort to shift the responsibility for the accident from the company to the crowd which pushed the woman into a place of danger, or prevented her from avoiding the place by the exercise of ordinary care, the court says that the company was bound to know that crowds might congregate upon its platform, and that injury to its intended passengers might result from defects in its platform under such circumstances. The presence and struggle of the crowd to get upon its cars only increased the danger of accidents from the unsafe platform. It did not relieve the company from responsibility for such accidents. It is settled by numerous decisions that railroad companies must provide means by which their passengers may safely enter their cars at stations, and must keep their platforms provided for that purpose in a safe condition. They are bound to know that if platforms become unsafe the lives and limbs of passengers are put in peril. Failure to keep such platform in a safe condition for the use of passengers entering or leaving their cars is a neglect of duty which makes the company liable to persons injured without fault on their part by reason of such defective platform.

MOVEMENT OF CAR BACKWARD FROM SLIPPING OF TROLLEY WHEEL.

Campbell v. Consolidated Traction Co. (Pa.), 50 Atl. Rep. 829. Jan. 6, 1902.

In front of a man seated in a wagon standing on a street railway track were two cars, the nearest being about 10 feet in advance of his horses, and a car was back of him, close to his wagon. On another track a car stood to his left, and to his right the street was crowded with people, so that he was completely hemmed in. As the second car in front of him moved ahead on an ascending grade, the trolley wheel slipped from the wire, and the car stopped, and then slipped backward about 60 feet, and struck the car back of it. Either the force of the collision drove the rear car against the man's horses and wagon, or the motorman of that car moved it backward to avoid a collision.

In affirming a judgment for damages in the man's favor, the supreme court of Pennsylvania says that the proof of the foregoing facts established a prima facie case for him. He was not bound to go further, and show, by affirmative evidence, that the accident was an unavoidable one. He was in a place of apparent safety, and had no reason to apprehend danger from a backward movement of the cars. In the ordinary course of events such a movement was not to be expected. No extraneous cause interfered with the company's control of its cars. The loss of control may have been a pure accident, or the result of mismanagement, or of defective appliances. If the slipping of the wheel was an accident which could not have been guarded against, the question would arise whether proper means had been provided to arrest the movement of the car in such an emergency; and, if so, whether proper use had been made of them. The case was one in which the proof of the accident and the attendant circumstances gave rise to a presumption of negligence, and made it incumbent on the company to show that due care had been used. Whether this was shown was necessarily for the jury.

WHERE DUTY IS TO KEEP IN REPAIR SURFACE OF STREET ALONG TRACKS.

Leary v. Boston Elevated Railway Co. (Mass.), 62 N. E. Rep. 1. Jan. 1, 1902.

Section 32 of chapter 113 of the Public Statutes of Massachusetts provides that a street railway corporation shall keep in repair, to the satisfaction of certain officers therein named, simply "the paving, upper planking or other surface materials" of the part of the street covered by its tracks, and, in the case of an unpaved street, an additional space of 18 inches upon each side of its tracks. Under this statute the railway corporation, the supreme judicial court of Massachusetts says, is no longer required, as formerly, to keep in repair the whole of that part of the street covered by its tracks, but only the surface thereof. This limited liability cannot be construed as imposing upon the corporation the duty of filling an excavation from the bottom. It is only when the excavation has been so filled by the municipality or other party upon whom rests the general responsibility for the safety of the street as to reach the plane where surface material is required that the duty of the railway company begins, and it is only when its duty begins that it can be held answerable for the condition of the street and then only to the extent of that duty.

In this case, it appeared that the corporation in question owned and operated a street railway with tracks in a street which the court assumes was unpaved. A trench was dug so as to come within 18 inches of the track, by a party, under a permit, it was said, from the city, for the purpose of constructing a sewer in the street. If so, then the opening, the court holds, was legally made, and the corporation had no authority to close it; and while the trench was legally there it was not charged with the duty of keeping in repair the portion of the street within the lines of the trench until the latter had been so far filled as to call upon it to fix the surface. Until that time arrived, there was no surface to be cared for by the corporation, and the responsiblity for the condition of the street and the duty of protecting travelers, either by guards or otherwise, were upon the city.

BICYCLIST BOUND TO LOOK AND LISTEN BEFORE CROSSING TRACK—DOMINANT RIGHT OF COMPANY—GETTING ON OR OFF MOVING CAR.

McCracken v. Consolidated Traction Co. (Pa.), 50 Atl. Rep. 830. Jan. 6, 1902.

The supreme court of Pennsylvania says that in this case both a bicycler and the company attempted to use one particular place on the track at the same instant of time. The dominant right to the track was in the company. That right must be conceded and deferred to by all of the public who have a right to cross. When about to cross they must use ordinary prudence to ascertain whether the owner of the track is about to use it. This bicycler was bound to look and listen before crossing. A bicycler is not exempt from observing the caution imposed upon all others of the public about to cross railway tracks. To hold otherwise would be to give the bicycler a right on the tracks superior to that of the railway company. As a necessary preventive of accident, the court would be compelled then to hold that the motorman must stop and look out for the bicycler. In passing on the question as to whether the bicycle is a vehicle chargeable with toll on turnpikes, this court has held that it was; therefore in propelling his vehicle the rider was bound to exercise in some degree the care of a driver of a team.

Again, the court says that it is per se negligence, or negligence in and of itself, to get on or off a moving car, yet we see usually prudent and careful men every day commit that act, and comparatively few are injured; but nevertheless it is negligence. Many persons usually careful attempt to cross in front of a moving car; many do not stop, look, and listen when about to use the crossing of a steam railroad. While the fear of death or mangling ought to prompt care, this court knows from long observation of the appeals in it that in very many cases it does not. The court cannot, therefore, assume that it is incredible that this bicycler attempted to cross in front of a rapidly moving car in full view. It is possible, but not probable, that when he made up his mind to cross the car was 100 or 200 feet distant; but where was it just as he approached the first rail? He was then bound to look. It was then just about one second in time distant, about the time it took him to cross the roadbed. If he then looked, as he was bound to do, he saw it, and was negligent in attempting to cross. If he did not look, it was negligence in him not to do so. There was no imperious necessity dictated by hastily formed judgment impelling him to go straight on, as in cases where a man by no fault of his own is in peril. He was then still in a place of safety. He could have stopped and dismounted, or he could have kept outside of the rail on the same side of the road. To argue that he could not cross because a car, when he saw it, 500 feet off, without fault on his part ran him down, is at war with every man's senses and experience derived from observation. The car obviously had only to traverse as many feet on the rails as would equal his time in the 17½ feet crossing them.

CARE REQUIRED FOR PROTECTION OF PERSONS AT RETURN STATIONS IN PARKS.

Muhlhause v. Monongahela Street Railway Co. (Pa.), 50 Atl. Rep. 937. Jan. 6, 1902.

A carrier, the supreme court of Pennsylvania holds, must furnish a safe and effiicient means of ingress to and egress from its trains. It is likewise incumbent upon it to exercise ordinary care in protecting from danger persons assembled at its stations, intending to depart by its trains. Rudeness and bad manners of strangers and intending passengers, resulting in injuries, will not convict a carrier of negligence. Such conduct is not to be anticipated, and the carrier is not required to provide against it. But when a street car company invites the public to use its line to visit a park or other public place of amusement or recreation, and thereby induces large crowds of people to assemble at its stations in such place, the corporation must use reasonable care in handling the people and in protecting them from injuries arising from the conduct of the crowd in entering and leaving its cars.

That many people will collect at the stations on such occasions, the corporation must anticipate, and it is obligatory on it to see that its station accommodations and means for assuring the safety of its intending passengers are commensurate to the crowd which is likely to assemble. It is the experience of every one, and especially of those who operate street cars, that large bodies of people awaiting transportation rush on the car to secure seats immediately on its arrival at the station, regardless of consequences to individuals; and this is true of all classes of people. This fact the corporation is presumed to know, and to use proper care in controlling the crowd and guarding against the dangers arising from its probable conduct. What means shall be employed to insure the safety of persons on such occasions must be left to the corporation, subject, however, when the question is raised, to the approval or disapproval of the proper legal tribunal.

In this case, a boy standing one Sunday evening, at about three feet from the track in an inclosure for taking cars in a park was knocked under the car wheel by the crowd which rushed for a car hanging on it and projecting from the running board striking his sister, causing her to fall against him. In affirming a judgment in his favor for damages, the court points out that large crowds were attracted to the park by the advertisements and inducements held out by the company, whose street car lines furnished the means of transportation to and from it, and whose cars and stations were crowded on such occasions, on this one not in excess of other similar occasions, and it says that it was therefore clearly the company's duty to anticipate the size of the crowd that would assemble at the station on the evening of the accident, and to make suitable arrangements for its control and management. The case it says was necessarily carried to the jury on the question of the company's negligence by evidence that there were 150 to 200 people at the station, ready and anxious to board the first departing car, when but a single open car entered to carry them to their destination, and this at an excessive rate of speed, much beyond what the safety of the people awaiting it permitted, and that there was no person in charge of the gateway used as an entrance to the station, nor was there any officer or person at the station to control or direct the movements of the crowd.

CROSSING DIAGONALLY IN FRONT OF CAR TO TAKE SAME—CAR NOT STOPPING—HEARING RUMBLING AND NOT LOOKING SECOND TIME.

Copeland v. Metropolitan Street Railway Co. (N. Y. Sup.), 73 N. Y. Supp. 856. Jan. 10, 1902.

A woman started diagonally across a street crossing to be in position to take a car. Before proceeding, she had observed the position of an approaching car, which, when she was near the track, she saw half a block away, and observed at that moment that her son, who was with her, gave a signal to stop it. She, no doubt, thought that the signal would cause the car to slow down or to stop, and it would seem that in such event she would have crossed in safety, because without the motorman having done anything, so far as appeared, to check the speed of the car, she had almost reached the sidewalk, and was in the act of placing her left foot thereon, when she was struck by the rapidly passing car, which did not stop after the accident occurred until it had gone two lengths further on. Under these circumstances, the first appellate division of the supreme court of New York thinks that the question of contributory negligence, as well as that of the company's negligence, should have been submitted to the jury, and that the dismissal of the complaint at the close of the plaintiff's case was error, for which the judgment should be reversed, and a new trial ordered.

The woman's judgment that she could cross in safety, the court thinks the foregoing showed, was in fault only because of the fact that the motorman had decided not to stop, and did not, in answer to the signal, slow down; nor did he, by the ringing of the bell, notify her of his intentions. Had he rung the bell, thus indicating the nearness of the car, she could have accelerated her steps and reached a point of safety. It could not be said that, as matter of law, she was guilty of contributory negligence, since it appeared she had seen the car at a distance which she thought sufficient to enable her to cross in safety, and her judgment was at fault only because the unusual and exceptional thing occurred,—of the motorman, after the signal was given him to stop, and while she was in plain sight, crossing the track, failing to stop or slow down at the crossing, or to give warning, by ringing the bell, of his intention to proceed at undiminished speed.

There were two circumstances which would, no doubt, the court goes on to say, have some weight with the jury, namely, that after seeing the car when near the track, and starting to cross it diagonally, the woman did not again look, and that during such time she heard the rumbling of the wheels. The rumbling, in itself, however, would not be a warning, because she had heard this when the car was half a block away, and she expected such sound to continue until the car stopped at the crossing. And, as to her failure to look at the car, she could not very well do so, considering the direction in which she was walking, without turning nearly around; and not only would this have been difficult, but it would have tended to retard her progress, and thus increase the risk of reaching the sidewalk in safety. These circumstances, as stated, were to be considered by the jury; but they were not, in the court's opinion, sufficient to justify the inference, as matter of law, that the woman was guilty of contributory negligence.

DUTY TO PASSENGER TO SOUND GONG AND TO TRY TO AVOID COLLISION WITH VEHICLE.

West Chicago Street Railroad Co. v. Tuerk (Ill.), 61 N. E. Rep. 1087. Dec. 18, 1901.

This action was brought to recover for personal injuries which a passenger on a cable train sustained in a collision of the latter with a buggy. It appeared that the buggy had been driven several blocks along the same avenue that the train was running; that it would sometimes be behind the train, and sometimes ahead of it; that most of the time it was out of the track; that it was driven rapidly, and sometimes passed the train and sometimes was passed by the train; and that shortly before the accident, because of obstructions in the street, it had to be driven on the track along the street. Now, if the driver of the buggy, instead of a passenger on the train, had been suing the company, it might be, the supreme court of Illinois says, that there was such knowledge brought home to him that he would have been deemed, in law, to have not exercised ordinary care for his own safety, because of his knowledge of the presence of the train, or its proximity to him, and, under such state of the case, would not have been in a position to insist that the mere failure of the company to sound the bell was negligence, inasmuch as he might be deemed to know just what the sounding of the bell would inform him.

The duty of the company in this case, however, was not to be measured by the satisfaction of the board of street and water com-the company, but by the rights arising from the relation existing between it and the passenger. There was no pretense that she was not using all the care she could use for her own safety, and the question that was presented to the jury was, did the company use all the care for her safety that it was its duty under the circumstances of the case? While it might be that it could say to the driver of the buggy, "You have no right to complain. You knew our train was running on this track at that particular time, and near to you; and ordinary care required that you use reasonable effort to avoid injury, and that reasonable effort would have required you to have driven off our track, or, when off, to have remained off until we passed with our train." Yet the passenger had the right to demand and rely upon the company exercising every act that human care, vigilence and foresight could reasonably do, consistent with the operation of its road, to avoid injury to her; the court declares that it is unable to say that the judge should have instructed the jury that it was not the company's duty to ring the bell, or to do any other and every other act that was calculated to avoid this injury. This was especially so in view of the fact that the train was running at full speed, and that it was not pretended that the company's servants in charge of the train did not know that the buggy was on the track, or that they did not see it.

Wherefore, the court holds it was not error to refuse an instruction in this case that, because the driver of the buggy knew that the train was traveling in the same direction he was driving, it was immaterial whether the bell or gong on the train was sounded or not, which meant the same as to say that the failure to ring the bell was not negligence. The declaration contained a general charge of negligence, and it was a question of fact for the jury to determine whether, under all the facts and circumstances, the company was guilty of such negligence as made it liable. Judgment against company affirmed.

VALIDITY AND EFFECT OF ORDINANCE REQUIRING REPAIR OF PAVEMENT—EVIDENCE OF NEGLIGENCE—NOTICE IMMATERIAL—INJURY OF PASSENGER PASSING BEHIND CAR.

Fielders v. North Jersey Street Railway Co. (N. J. Sup.), 50 Atl. Rep. 533. Nov. 11, 1901.

A city ordinance, passed under due legislative authority to regulate street railways, that require operating companies to repave and keep in repair, to the satisfaction of the proper city authorities, in any paved street of the city in which their tracks are or shall be laid, a space between lines one foot outside of their outer rails, under penalty that, on default after notice, the city may repair at the company's cost, the supreme court of New Jersey holds, is a valid police regulation, creating a duty towards the traveling public, and is evidential in an action for negligence brought against such a company by a passenger who is injured through a defect in that part of the street pavement while passing from car to sidewalk. In such a case the ordained duty is absolute, and not dependent on notice. The failure of the board to act would not be proof that it under the ordinance, or previously laid and fallen into repair.

In this case, there was evidence that the passenger alighted at the only place afforded for that purpose from a car which was stopped for her at a crosswalk. By direction of the conductor, she passed behind the car towards her destination, pointed out by the conductor, on the opposite side of the street. In so doing she was injured through a defect in the pavement adjoining the cross walk, at a place where it was the duty of the company to keep the pavement in repair. The defect had existed for upwards of two months. She did not see, and had no warning of, the danger. Under these circumstances, the court holds that it would not have been lawful for the trial judge to have held either that no negligence chargeable to the company had been proved, or that the negligence of the passenger indisputably contributed to her injury. The case, in both aspects, was for the jury.

As to the company, the court says, negligence was fairly inferable from a management of affairs that permitted the passenger, without warning, to alight from and pass behind the car when so overhanging the cross walk as to make her encounter a dangerous defect long existent in the pavement. When to this was added the ordained duty of the company to have kept the pavement in repair, negligence was hardly disputable. With regard to the contention that a passenger alighting from a street car should be held to take the risks of defects in the highway, the court says that depends upon circumstances, a most important one in this case being that the defect was a result of the carrier's breach of duty. Where a duty is imposed by law to keep a highway in good condition, an action lies for injury sustained by reason of the neglect of that duty. That the fulfillment of the requirement to repair was to be measured by the relative rights of the driver of the buggy and missioners, the court says, was immaterial, as was also a provision for the city's making repairs at the company's cost on default after notice. It is immaterial whether the defective pavement was laid was satisfied with the condition of the pavement, nor did the provision for notice imply that no repair need be made except upon notice.

DUTY TO KEEP PLATFORMS AND STEPS OF CARS IN SAFE CONIDTION IN ALL WEATHER.

Herbert v. St. Paul City Railway Co. (Minn.), 88 N. W. Rep. 996. Jan. 31, 1902

A street car company, the supreme court of Minnesota holds, is required to exercise the highest degree of care to keep its platforms and steps in safe condition for use in the season when operated, so far as it practically can do so, in consideration of the climate, temperature, and condition of the air with respect to snow, moisture, and frost. And it affirms in this case a judgment for $1,000 damages for injuries sustained by a passenger who, when alighting from a street car, slipped and fell from the same by reason of ice and snow alleged to have been negligently permitted by the carrier to be and remain upon its steps and platforms.

DUTY WHEN CAR APPROACHES WHERE ONE ON OPPOSITE TRACK IS STOPPED—UNREASONABLE SPEED EVIDENCE OF NEGLIGENCE—FAILURE TO LOOK FOR APPROACHING CARS.

Bass' Administrator v. Norfolk Railway & Light Co. (Va.), 40 S. E. Rep. 100. Dec. 5, 1901.

A passenger on alighting from a car went around it onto the other track, where he was struck by a car coming from the opposite direction. The supreme court of appeals of Virginia holds that it was the duty of the company not only to give notice or warning of the approach of its car, but as it neared the crossing, where its first-mentioned car had stopped to let off and take on passengers, to run at such a rate of speed as to have the car under control, and be able to stop it readily. Unless unusual speed is expressly permitted by law, the speed of a car, it says, ought to be no greater than is reasonable and consistent with the customary use of the street by the public with safety. Any speed in excess of that rate is at least evidence of negligence.

Failure to look for approaching street cars by a person about to cross a street railway track, especially at a street crossing, ought not, the court thinks, upon principle, to be held to be negligence, as a matter of law. It says that the authorities upon this question are conflicting, but that its conclusion is sustained by some of the ablest text writers, and by many, if not by a majority, of the decided cases.

RISKS ASSUMED BY EXPERIENCED CONDUCTOR LEARNING DUTIES ON ANOTHER ROAD.

Ladd v. Brockton Street Railway Co. (Mass.), 62 N. E. Rep. 730. Feb. 27, 1902.

A man who had acted as conductor on other roads and considered himself an experienced man, was struck by a trolley post at a place where the track ran along the side of the road for about 1,000 feet on a line that he was engaged in learning the duties of conductor upon in anticipation of being employed on. He began learning those duties two days before the accident, but had not worked on that part of the road before that morning, though on that morning he had made two or more trips by the place where the accident happened before it occurred. He testified that he knew that it was common in country towns to have tracks run on one side of the road, and that he knew that in such cases there were posts for the trolley wires. He also testified that he did not observe whether the car was on the side of the road or in the center, and paid no attention to that fact, or to the post or poles or track. And there was nothing to show that as he stepped down onto the running board he looked to see if there were any obstructions, or exercised any precautions. It also appeared that the running board on the opposite side of the car would have been entirely safe, and that there was nothing requiring him to use the running board on one side of the car rather than the other. Under these circumstances the supreme judicial court of Massachusetts holds that, at the close of his evidence, a verdict was properly directed for the company.

The court says that it thinks it plain that the risk was an obvious one, which the man must be held to have assumed, and that he was not in the exercise of due care. The situation of the posts and tracks was manifest, or, so far as appeared, was not unusual. There was nothing in the nature of a trap. The man was familiar with the duties of a conductor. The company owed him no duty of warning or instruction in regard to dangers that were obvious, and it owed him no duty to change the arrangement of the track and the posts. Upon entering the employment of the company, he must be held to have contracted with reference to those as they were. Moreover, in view of the fact that he had been sent out upon that portion of the company's road where he was when injured to learn the conditions attending its operation there, it seems to the court that to step down onto the running board as he did without looking to see whether there was any obstruction in the way or whether it was safe to do so was negligence on his part.

USE OF COUNTRY HIGHWAYS.

Farmer v. Myles (La.), 30 So. Rep. 858. Nov. 18, 1901.

Police juries have no legal authority to grant a right to construct, own, and operate a line of railway over and through the public roads in the parishes, the supreme court of Louisiana holds, under section 2750 of the Revised Statutes, which authorizes them to pass all such ordinances as they may deem necessary relative to roads, etc. It says that the grant of power for this purpose must be specific, and not implied. Country roads cannot be occupied by street railway tracks without legislative sanction. The authority must be granted by the legislature directly or through the authorized action of the municipality. It is generally conceded that country roads cannot be used for such purpose, even by legislative consent, without compensation to the adjoining landowners. Any legislative permission to use public roads for such purposes would be subject to the rights of the adjoining landowners in the premises. The right could not be exercised under the permission, unless the owners should have given their voluntary consent, or their forced legal consent had been obtained under expropriation proceedings. A landowner has the right to resist the unauthorized diversion of a country road over his property to any other than its usual and legitimate use.

INABILITY TO STOP A CAR ON STEEP GRADE BETWEEN CROSS STREETS—RIGHTS AND DUTIES OF PEDESTRIANS.

Burian v. Seattle Electric Co. (Wash.), 67 Pac. Rep. 214. Dec. 14, 1901.

A cable car ascending a hill where the grade was about 20 per cent, with the cross streets level, was apparently stopped as quickly as possible after it reached the level of a crossing upon which there was a pedestrian, but before it had safely landed upon the level its front end struck him. It was urged in defense that the car could not, with safety to its passengers, be released from the cable until it had cleared the incline of the hill, and stood upon the level of the crossing, since if a gripman should release a car from the cable at any point on the incline it might not be possible by means of brakes to prevent the car from retreating down the hill, while the speed of the car could not be checked, since it must follow the speed of the running cable at that point. Therefore, it was insisted that no negligence could be attached to the company for not checking the speed, or for not stopping the car. But the supreme court of Washington says that it is not prepared to state as a matter of law that the company's rights were such as might authorize it to maintain a system of operating cars that would prevent it from safely stopping the cars at any point within the distance of an entire block, or at a point where they were in the act of entering upon the level of a street crossing.

The obligations of a street railway company and of other travelers along the street, the court says, are mutual, and each must exercise care to prevent collisions and accidents. This mutual obligation is as binding between the operator of the cars and pedestrians at a street crossing as it is between the operator and drivers of vehicles at other points along the streets. The car track is as much a part of the street as any other potion of the traveled way, and pedestrians have a right to cross the track, and particularly at street crossings they must of necessity cross it. If the apparatus used in the operation of cable cars renders the street crossing more hazardous to other travelers than under ordinary conditions, then the street car company should take every reasonable precaution to protect the public from that additional danger. Other travelers having knowledge of these extra hazardous conditions are also under obligation to exercise reasonable care and caution to avoid the danger.

Wherefore, the court holds that it was not within its province to say as a mater of law that no negligence was shown in this case on the part of the company in the fact that the speed of the car could not be checked, or that it could not be stopped before it reached the point where it did stop. This was a question to be submitted to the jury, that it might determine whether, under all the surroundings, the conditions which created the facts as stated constituted negligence.

CONSENTS ASKED FOR MUST BE FOR POWER AUTHORIZED BY COMMISSIONERS FOR REFUSALS TO BE COUNTED SUCH.

In re Kingsbridge Railway Co. (N. Y. Sup.), 73 N. Y. Supp. 440. Dec. 6, 1901.

The first appellate division of the supreme court of New York holds that where the state board of railroad commissioners has authorized the operation of a proposed road by electricity, it cannot be said that the abutting property owners have refused to consent thereto where the request made to them which was refused was a consent to "construct and operate a street surface railroad to be operated by electricity or any motive power other than locomotive steam power that may be approved by the state board of railroad commissioners," and hence that an application for the appointment of commissioners to determine whether the road should be constructed notwithstanding a refusal of the abutters to consent thereto must be denied. In other words, the court holds that the refusal of the property owners to consent to another and entirely different road than that authorized to be constructed—a road to be operated by a motive power of an entirely different character—is no evidence of a refusal of the property owners to consent to the construction and operation of a railroad authorized and which the railroad company proposed to construct.

LIABILITY FOR INJURY OF PASSENGER UNDER OPERATING ARRANGEMENT BETWEEN TWO COMPANIES.

Richard v. Detroit, Rochester, Romeo & Lake Orion Railway (Mich.), 89 N. W. Rep. 52. Feb. 11, 1902.

This was an action for personal injuries alleged to have been sustained by a passenger through the negligent starting of a car when she was alighting therefrom. The company sued had an arrangement with a connecting electric line for cars to be run through by both companies jointly between their joint terminals. The contract was that each company should remain in full control of the operation and management of the cars while on the tracks, and the ownership of the tracks should determine the responsibility of the respective parties to the public. Each party should have the right to replace the employes of the other at the junction point, so that its own employes might operate the cars while on its own tracks. Each company should pay to the other, for the use of double-truck passenger cars two cents per car mile. The fares should belong to the company owning the tracks, for a ride over which they were collected.

The accident in question occurred near the switch where the car of the company sued, on which the passenger had ridden over the other company's line, left the latter's track. The company sued claimed that the passenger was hurt before the switch was reached, while the car was on the other company's tracks, and while the conductor and motorman were under the control of that company's superintendent; that while these employes were primarily paid by the company sued, it was reimbursed by the other company, and, if there was any liability at all, it was the other company which was liable, and not the company sued. The record disclosed that, upon the fare paid by her, the passenger would have been entitled to ride at least a block further than where she got off, and over a portion of the road of the company sued. It also showed that the conductor had thrown the switch belonging to the company sued before the car was started.

In affirming a judgment against the company sued, the supreme court of Michigan states that whatever might be said of this contract, between the parties thereto, it was very clear that it was to the mutual advantage of both the companies to have the cars of the company sued pass over the track of the other company, and to have passengers ride in the cars of the company sued. The fare which this passenger paid entitled her to ride over the tracks of both companies, and, according to the contract, each company was receiving a good and valid consideration for her ride. One received a five-cent fare; the other received a rental for its cars, the privilege of through car service, and all the benefits which such service brought, by giving the company sued a terminal where it did. Then, under the most favorable construction which could be given to the contract, the company sued and the other company were jointly operating the car on the night in question, and were jointly and severally liable for any tort or wrongful act which may have been committed by their servants. And, the court adds, it is a well-settled principle of law that, where more than one party is guilty of a negligent act, the party injured may proceed against them jointly or severally.

IMPLIED DUTY AS TO REMOVAL OF SNOW FROM STREET.

Gerrard v. La Crosse City Railway Co. (Wis.), 89 N. W. Rep. 125. Feb. 18, 1902.

The complaint in this case set forth in detail the requirements of the city ordinance granting to the company its street franchises that it should not allow snow or ice to accumulate upon its tracks in such quantities as to obstruct travel, nor deposit snow upon the street in such manner as to obstruct travel or render the same unsafe, and charged their violation. Moreover, by the last clause of the third subdivision of the complaint it was charged, in substance, that the company negligently caused the snow and ice on its track to be excavated and removed in such manner as to leave a deep ditch, rendering the street unsafe and dangerous for public travel. The supreme court of Wisconsin says that it can contrue this as meaning nothing more or less than a breach of the common-law duty not to render the street unsafe for travel, which is manifestly wholly independent of the provisions of the ordinance. It was argued, however, that there was no such common-law duty; that the company's obligations to the public were measured by the requirements of the ordinance. But with this contention the court says that it cannot agree.

Even in the absence of any requirements in the ordiance upon the subject, the court says it must be held that when the company received its franchise to operate a street railway upon the streets for its private gain, as well as the public convenience, it at the same time assumed a duty to the public not to unnecessarily render ordimay travel on the street dangerous. It must exercise its rights with due deference to the rights of the general public. It had no license to build and operate its tracks with total disregard of the rights and safety of the man with the horse and wagon, or the woman with the horse and cutter.

On this subject, the court quotes from Elliott on Roads and Streets (2d Ed., sec. 764), "A street railway company which accepts a grant or a license impliedly agrees that it will use due care not to unnecessarily impede travel or to make the use of the street hazardous. The burden which it assumes in conjunction with the benefit which it obtains is a continuing one, and it must bear it, though to do what due care and diligence requires may sometimes entail considerable expense. * * * Where the track is cleared for its own convenience, it must do what is reasonably necessary to make the part of the street not occupied by its tracks reasonably safe, for it cannot for its own accommodation obstruct it so as to endanger travelers." The court says that it accepts these propositions as correctly stating the law.

It was said that to require the company to remove any part of the snow from the street outside of its tracks was an undue burden, involving, perhaps, great labor and expense; but, as pointed out above, the court says, the company, by accepting its franchise, assumed a duty to the public and any disposition which it is obliged to make of falling snow in order to run its cars must be such a disposition as preserves the rights of the public to have a reasonably safe street for ordinary travel. If the public right can be preserved by simply brushing the snow to one side, well and good; but if the snow is so deep that the right can only be preserved by removing the snow from its tracks and from such additional space outside thereof as is necessary to prevent the formation of a dangerous declivity, then the company must make such removal. Any disposition which it makes of the snow must be made with due deference to the rights of travel upon the highway.

VALIDITY OF LICENSE TAX.

Newport News & Old Point Railway & Electric Co. v. City of Newport News (Va.), 40 S. E. Rep. 645. Jan. 23, 1902.

The question in this case was as to the authority of the city to levy a license tax as follows: "On each and every street railway company twenty-five dollars each for the first ten cars, and ten dollars on each car in addition thereto used in the city, and an additional tax of fifty cents on each and every pole owned by said company in this city." The charter of the city provided that, "For the execution of its powers and duties the council may raise taxes annually by assessments in said city on all subjects taxable by the state, such sums of money as it shall deem necessary to defray the expenses of the same, and in such manner as it shall deem expedient, in accordance with the laws of this state and of the United States." This language, the supreme court of appeals of Virginia holds, conferred upon the city council general powers of taxation, including all persons and subjects of taxation, except only as it might be limited by the laws of the state or of the United States. And, upon the whole case, the court is of the opinion that the ordinance in question was not in conflict with the constitution and laws of either the state or the United States, but was a legitimate exercise of municipal power.

It was contended that this ordinance was invalid, because in violation of the provision of the state constitution securing equal and uniform taxation, and was also obnoxious to the provision which authorizes the general assembly to levy a tax upon certain licenses named, and all other business which cannot be reached by the ad valorem system. The argument was that, inasmuch as no license tax was imposed by the state upon the company bringing this action, its property being reached by the ad valorem system for purposes of state taxation, no license could be imposed by the city until the state abandoned its method of taxation, and declared that the property could not be reached by the ad varolem system. But the court points out that the property used in conducting the company's street railway business was taxed by the city upon the ad valorem basis, as it was by the state, the ordinance in question imposing, in addition, a license tax upon the privilege enjoyed of conducting the street car business. That the privilege of running street cars through the crowded thoroughfares of a city is, in the discretion of the council, a legitimate subject upon which to impose a license tax, either for the purposes of raising revenue under its general powers of taxation, or in the exercise of its general police power, the court says, cannot be seriously questioned.

The license tax required was not unequal taxation, the court holds, because the ordinance imposing it applied alike to all street railway companies. Nor is it a double taxation to require a street railway company to pay a license tax for the privilege of conducting its business, and at the same time to impose a tax upon the property used in carrying on that business.

Neither does the court consider the position tenable, that because street railways were not mentioned in the section of the city charter which authorizes a license tax upon certain pursuits therein stated, they were therefore excluded from such taxation, it being clear that the legislature did not undertake to enumerate all the subjects and classes upon which a license tax might be imposed. Likewise, it pronounces unsound the contention that the right to assess a license tax upon the company, in order to be exercised, should have been reserved to the city in the ordinance granting the company the right to construct its tracks and operate its cars on the streets. It says that the right to levy taxes does not arise out of contract. Exemption from taxation is never to be presumed. It has been repeatedly held that a municipal ordinance granting to a street railway company a franchise to construct its tracks and operate cars upon the streets of the city, and which is silent upon the question of taxation, cannot be construed as conferring immunity from the payment of a license tax in the absence of an express stipulation to that effect. The company took its charter subject to the same right of taxation in the city that applies to all other privileges and to all other property. If it wished or intended to have an exemption of any kind from taxation, it should have obtained a provision to that effect in its charter.

Because the company's street railway extended beyond the corporate limits of the city, through the county, to certain adjacent towns, it was suggested that a railway company is an entirety, and cannot be spoken of as actually located in any county, city, or town which it traverses. Granting this to be true, still, the court says, it may be taxed by the city, the streets of which are traversed by it, upon the business done in such city, although its lines extend beyond the city limits.

CONSTRUCTION AND OPERATION OF ROAD WITH CURVES—SWAYING OF CARS MUST BE EXPECTED—CONTRIBUTORY NEGLIGENCE OF PASSENGER ON RUNNING BOARD OR FRONT PLATFORM.

Bruce v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 74 N. Y. Supp. 324. Jan. 17, 1902.

The second appellate division of the supreme court of New York says that it apprehends that it is not the law of that state that a street surface railway must be built upon a straight line, after the manner said to have been directed by the Czar of Russia in the construction of a transcontinental railroad or that in the practical operation of the cars they shall be so handled as never to sway or vibrate. It says that it shall assume that such corporations may construct their lines upon approved engineering plans, with such grades and curves as shall be necessary in the practical accomplishment of the purpose for which they are created; and that in the operation of the cars they may, subject to the liability for the negligent injuring of passengers or persons lawfully upon the highway with their property, run them in such a manner as to meet the requirements of transportation. In other words, it is not required that in the operation of street railway cars there shall be no swaying of the cars, no jars or jolts. These are reasonably to be expected in the practical discharge of the duties which are assumed by the corporation in accepting its franchise, and it is the duty of passengers to take notice of the obvious fact that a car weighing from 4 to 10 tons, running at a practical rate of speed, will be subject to the laws of applied mechanics, and will be swayed with greater or less violence in passing around curves, and will be jolted to some extent in passing over other tracks at street intersections.

This, the court continues, does not give the street railway company a license to operate its cars without regard to the safety of passengers. It owes them the duty of carrying them in safety over its lines, provided, always, that the passenger has been guilty of no neglect contributing to the accident. For instance, if a passenger is occupying a seat in a car, and voluntarily leaves that seat, and steps down upon the running board of an open car, and, without taking hold of anything, relies upon his being able to keep his balance, and the car, in passing around a curve, should throw him off, the company would not be liable, even if it were negligent in the operation of the car; and the burden of proving lack of contributory negligence is upon the plaintiff at all times. It is true, of course, if the injury happened to the passenger while occupying a seat provided by the company, the presumption of lack of contributory negligence would at once arise; but it is none the less proved by the plaintiff by establishing the facts which made it impossible for the passenger to contribute to the accident, as in the case of a collision or the derailing of a car.

In this case, all that was established by the evidence was that the passenger (a policeman) thrown from a car at a curve had left the interior of the car, where it was not to be doubted he was perfectly safe, and took a place upon the front platform. Conceding that it was not negligence per se, or in and of itself, to occupy a place upon the front platform of a car, it is equally certain, the court says, that it was not evidence of lack of contributory negligence. No legitimate inference may be drawn from the fact that a man leaves the interior of the car where he is not crowded, and where the company has afforded accommodations for its passengers, and goes out on the front platform, that he is free from contributory negligence at a time when he reaches the platform. Here it was undisputed that the passenger gave no sign to the motorman that he was present upon the platform until just at the moment of entering upon the curve; and, if it be held that it was negligent upon the part of the company not to operate its cars in such a manner as not to injure one who had quietly taken a place upon the platform without the knowledge of the company's servants, the court holds that it could not be said that it was evidence of a lack of contributory negligence on his part, and without such evidence there could be no recovery of damages.

RISKS ASSUMED BY EMPLOYE GOING IN SEVERE WEATHER INTO OPEN COUNTRY TO REMOVE SNOW FROM TRACKS—WHEN COMPANY LIABLE FOR INJURIES THEREFROM.—TRANSPORTATION OF EMPLOYE.

King v. Interstate Consolidated Street Railway Co., 51 Atl. Rep., 301. Carll v. Same, 51 Atl. Rep., 305. (R. I.) Feb. 12, 1902.

In the first-named case it was alleged in the first count of the declaration that the party suing was employed by the company to help remove snow from its tracks in very cold weather, the work to be done over a wide tract of open country, remote from dwelling houses and other habitations; that the company knew that the work was very trying and dangerous to those engaged therein, and that it was its duty to furnish the party suing sufficient food and shelter during the continuance of the work, and to provide for his safety while so employed, and to carry him to his home when returning from the work; that he was ignorant of the danger attending the work, and that while engaged for 24 hours therein, and while in the exercise of due care, and in ignorance of the peril to which he was exposed, both of his feet were frozen, of which fact he informed the company's agents and servants, and requested them to carry him to his home, but that the company, its agents and servants, well knowing the premises, carelessly and negligently failed to provide food and shelter for him; and that the freezing of his feet was due to the failure of the company, its agents and servants, to supply him with food and shelter while so engaged; and that they had to be amputated. The second count differed from the first in that it alleged that, without fault on his part, both of his feet were frozen, of which fact he informed the company, its agents and servants, and requested them to carry him to his home, which they carelessly and negligently refused to do, and being unable to procure passage to his home, he was obliged to make his way there on his hands and knees, and was engaged in making said journey from 7 o'clock in the evening until 8 o'clock the next morning. And he averred that in consequence thereof, and without fault on his part, his feet were so badly frozen that they afterwards had to be amputated, and that it was the duty of the company, under the circumstances set forth, to provide him with food and shelter and transportation as stated.

The supreme court of Rhode Island holds both counts demurrable. The first, in failing to allege that the company either expressly or impliedly assumed the duty of furnishing the party suing with food or protection from the cold. That one of the risks incident to long-continued outdoor employment in the winter time in this climate is that one's feet or hands may be injured by freezing, the court says, is so clearly within the rule of assumed risks on the part of the servant as to require no argument. The furnishing of food and clothing, the proper care of oneself in the doing of his work, the recognition of the existence of well-known physical laws,—these duties, in the absence of some custom, rule, or understanding to the contrary, are clearly devolved upon the servant; and for any failure to observe them he alone must suffer the consequence. In order therefore, to cast such a duty upon the company as that which was here relied upon, it must appear from the facts and circumstances set forth in the declaration that the party suing was led to neglect or omit to provide for himself by reason of the fact that the company had assumed the duty of providing for him. Likewise, with reference to the second count, the court says that it was not alleged that the company conveyed the party suing to his place of work, or that it promised, either expressly or impliedly, to carry him back to his home; and it was not, and could not successfully be, contended that it is any part of the duty of an employer to carry his employes to or from their place of work, in the absence, at any rate, of some custom, understanding, or agreement to that effect.

The second named case, like the first, was one of trespass on the case for negligence, as it is called. But there was a material difference between the two cases in at least two respects, viz.: The declaration in the second case set out that the party suing was taken and conveyed by the company to the place where he suffered his injuries before being set to work, and that after he began to suffer from the cold, and was unable to work any longer, and requested to be permitted to leave off work, and being refused, he was ordered to enter and permitted to remain in one of the company's cars, and that the company wholly neglected to take care of and provide for him for a long time, while practically in a helpless condition. In view of these allegations, the court holds that the demurrer in this case should be overruled. It says that, if the company directed the party suing in this case, after becoming disabled to work, to go into one of its cars, and permitted him to remain there, as alleged, it cannot say, under the circumstances, that it would not be competent for the jury to find that the company assumed upon itself the duty of taking reasonable care of him while there, and of seasonably conveying him to his home, or to some place where he would be taken care of.

CARE REQUIRED IN SELECTION OF PLACE FOR PASSENGER TO ALIGHT.

Foley v. Brunswick Traction Co. (N. J.), 50 Atl. Rep. 340. Nov. 15, 1901.

A passenger, in alighting from a street car at a point of transfer, or temporary terminus selected by the company, stepped upon a stone in the highway, and sustained injuries for which she brought suit. The jury was instructed that she could recover damages if the place selected by the company for her to leave its car was not a safe one for that purpose. The court of errors and appeals of New Jersey holds that this instruction was erroneous, because it did not submit to the jury the question of the company's negligence, which was the gravamen or vital point of the action.

The gravamen of the action, the court says, was the failure of the company to use reasonable care for the woman's safety as a passenger; hence the correct instruction would have been that the company was liable for her injuries if it failed to take reasonable precautions to see that the place provided by it for her discharge was a safe one for that purpose. If this language be transposed so as to read that it was the duty of the company to see that the place where it discharged her was a safe one if reasonable precautions would make it so, the court says the doctrine will receive an apparent emphasis, although upon analysis each statement will be found to be the legal equivalent of the other. Whatever the form of words employed, the idea expressed should be that the guilt of the company is to be measured by the degree of care it has put forth for the passenger's safety, and not by the degree of success attendant upon its efforts.

There was, doubtless, a degree of circumspection, the court goes on to say, that would have discovered the stone in the highway, whatever its size or location might have been, and a degree of caution that would have prompted either its removal or the selection of some other place as a temporary terminus; but whether such circumspection and such caution were required of the company depended upon the reasonableness of its exercise, and that question was not left to the jury. It might be that the jury, notwithstanding the undisputed fact that the woman fell while alighting upon the highway, would have found that the stone that caused her to fall was so small in size, and so concealed from view, or was so connected with the roadway, that the company, in the exercise of reasonable care, would not have noted its presence, or have foreseen the danger of failing to remove it. It was the company's right to have that question submitted to the jury.

TURNING BACK OF PEDESTRIAN ATTEMPTING TO CROSS IN FRONT OF CAR NOT TO BE ANTICIPATED — CARE REQUIRED IN CROSSING STREET IN MIDDLE OF BLOCK.

Lawson v. Metropolitan Street Railway Co. (N. Y. Sup.), 74 N. Y. Supp. 885. Dec., 1901.

A motorman seeing a woman attempting to cross ahead of him, in the middle of the block, the appellate term of the supreme court of New York holds, was not called upon to anticipate that she would turn around and retrace her steps. Pedestrians attempting to cross a street upon which a line of cars run, especially in the middle of a block, are bound to exercise a reasonable degree of care not to place themselves in a position of danger.

RIGHT OF CONDUCTORS TO REGULATE MOVEMENTS OF THEIR CARS—DUTY TO PERSONS ATTEMPTING TO BOARD SLOWLY MOVING CARS.

Metropolitan Street Railway Co. v. Hudson (U. S. C. C. A.), 113 Fed. Rep. 449. Jan. 14, 1902.

Unless a car has reached one of its regular stopping places, or its speed has been slowed to permit an intending passenger to board it, or some invitation, express or implied, to board it, has been given by those in charge, the conductor, the United states circuit court of appeals, second circuit, holds, is under no obligation to anticipate that any person will attempt to board; and if, in ignorance of such an attempt, he causes the motorman suddenly to put on speed, he does not violate any duty towards an intending passenger. Conductors of street cars are at liberty to regulate the movement of their cars as they see fit so long as they do not violate their duties to others. If, however, while a car is proceeding slowly, the conductor is made aware that an intending passenger is attempting to board it, although it may not be his duty to stop the car, common prudence certainly forbids that he start it suddenly forward. No man is at liberty to do an act unncesessarily which he knows or ought to know is likely to imperil the person of another.

RIGHT OF PEDESTRIAN TO STAND ON CROSSING WHEN STOPPED BY BLOCKADE OF VEHICLES—FAILURE TO SOUND GONG.

Hernandez v. Metropolitan Street Railway Co. (N. Y. Sup.), 74 N. Y. Supp. 898. Oct., 1901.

A pedestrian attempting to cross a street where it would seem there were two different tracks was compelled by a blockade of wagons and carriages to stand between the two tracks, as he testified, over a foot from the inside one, when he was struck by a car, which, but for a curve, he would probably have seen and saved himself from injury by. The appellate term of the supreme court of New York holds that he was not guilty of contributory negligence, as a matter of law, as he had a legal right to go upon the track at the crossing, and stand at the place where he was injured. And failure to sound a gong or to give some notice of the approach of the car, under the circumstances, even though the car was moving at ordinary speed, it holds, would have been negligence, and the question whether notice of the approach of the car was given was properly submitted to the jury.

STANDING ON PLATFORM OR RIDING ON SIDE STEP OF AN OPEN SUMMER CAR.

Woodroffe v. Roxborough, Chestnut Hill & Norristown Railway Co. (Pa.), 51 Atl. Rep. 324. Feb. 24, 1902.

A passenger who stands on the platform of an electric car, when there are vacant seats inside the car, the supreme court of Pennsylvania holds, assumes not only the ordinary risks of the road, but all the risks incident to that position. The side steps of an open summer car, it likewise says, are not intended for the use of the passengers, except in getting in and out of the car. When a passenger rides on the side steps with the knowledge and consent of the conductor, and from necessity, from the want of room to sit or stand inside the car, he is entitled to the same degree of diligence as other passengers to protect him from known and avoidable dangers. But a passenger who rides on a side step, when it is reasonably practicable for him to sit or stand inside the car, takes upon himself the risk of his position, from any cause.

In this case, a passenger, while riding on the side steps of an open car, was killed by contact with a pole which supported the electric wire. It was overwhelmingly established by the testimony that his conduct was disorderly and reckless, that he disregarded repeated warnings of his danger, and that when injured he was holding the upright hand rail, with his arms extended, and his body and head thrown back from the car. These facts, the court holds, should have prevented a recovery of damages with the jury. Moreover, every witness for the party suing admitted that there was standing room in the car, and the court holds that this one fact was conclusive against her right to recover, and should have been so declared by the court. There was then, it says, no legal ground for recovery.

CHANGING SYSTEM OF SANDING TRACKS—CONDUCTOR AND MAN SANDING TRACKS FELLOW SERVANTS.

Smith v. Philadelphia Traction Co. (Pa.), 51 Atl. Rep. 345. Feb. 24, 1902.

A conductor standing on the rear platform of his car was injured by the collision therewith of an electric car on an intersecting street of descending grade. The negligence charged to the company was its failure to have on the latter car the proper appliance for sanding the track. It appeared that about two weeks before the accident the system of sand boxes on the cars had been abolished by the company, because the wheels of the cars had been flattened by that method of sanding the tracks, and another was substituted for it. By the substituted system sand was placed on the streets. A man put it on the tracks wherever needed, and one had charge of sanding them where the collision occurred. The supreme court of Pennsylvania holds that the substitution of this new system of sanding the rails was in itself no evidence of negligence by the company. It says that it could be fairly presumed that the traction company, in adopting what it conceived to be a better system of sanding its tracks, relinquished none of the care it was bound to observe in the operation of its lines. It continued to guard against danger resulting from slippery tracks by continuing to sand them, and, without proof that the change in the mode of doing was improper, the jury ought not to have been allowed to guess that it was. The burden was upon the party suing to prove the negligence complained of,—failure to use proper means for sanding the tracks. No proof of such negligence appeared. Other means may have been used that made the slippery tracks safe, but the mere adoption of new ones, in the utter absence of proof, or even an offer to prove, that they were not efficient, or that their use was accompanied with danger, was no evidence of carelessness by the employer towards its employe. It might be that the rails were not properly sanded by the man whose duty it was to sand them, but that would be evidence only of his negligence,—a fellow servant of the injured man,—and not that the system itself was faulty or unsafe.

NO INTEREST IN SOIL OF HIGHWAY FOR TAXATION AS REAL ESTATE—FRANCHISE TAXABLE.

Mayor, Etc., of City of Newark v. State Board of Taxation (N. J.), 51 Atl. Rep. 67. Jan. 27, 1902.

That there is an inherent value in the property of a street railway company over and above the costs of reproducing its rails, stringers, poles, wires, power house, etc., the court of errors and appeals of New Jersey, reversing a decision of the supreme court, says, needs no demonstration. That value, however, springs not out of any ownership by the company of an interest in the soil of the highways over which its road passes, but out of its ownership of the franchise to maintain and operate its road over those highways, and to collect tolls from all persons traveling upon it. This franchise is property, and taxable as such. But under present legislation the right to tax it has been reserved by the state to itself, through its board of assessors, and not delegated to the several municipalities through which the company's road passes.

ASSIGNABILITY OF CONTRACT WITH STREET RAILWAY COMPANY FOR CONSTRUCTION AND OPERATION OF ROAD.

Lakeview Land Co. v. San Antonio Traction Co. (Tex.), 66 S. W. Rep. 766. Feb. 24, 1902

A contract of a street railway company with a land company by which the former, for a valuable consideration, bound itself to construct and operate a line of street railway out to and through an "addition" owned by the latter, the supreme court of Texas holds, was assignable within the terms of a statute providing that "the obligee or assignee of any written instrument not negotiable by the law merchant may transfer to another by assignment all the interest he may have in the same," there being nothing in this contract to indicate that it was limited to the parties making it either by its terms or by the subject-matter of the contract, the character of the thing to be done, nor any other fact that would go to show that the parties intended it should not be assigned. It sees no reason why the obligations of this contract could not be as well performed to any other owner of the lands referred to as to the original land company. And it is of the opinion that the assignment would be effective under the general rule, independent of the statute. Wherefore the court holds that the purchase of this contract, together with the lands, invested the purchaser with all the rights which the original obligee (land company) would have had under the same circumstances. Nor does it consider that this was rendered otherwise by the fact that the purchase was made by a foreign corporation, before it had procured a permit to do business in Texas.

RISK ASSUMED BY PASSENGER IN ATTEMPTING TO BOARD CAR AT TERMINUS BEFORE IT IS READY.

Clark v. Metropolitan Street Railway Co. (N. Y. Sup.), 74 N. Y. Supp. 267. Jan. 17, 1902

At the end of a line to which a passenger held a transfer ticket he attempted, upon its arrival, to board an open car on the side where the bar had been raised but the step had not been lowered. and was injured by being struck on the knee by the step, as the conductor lowered it. There was nothing to show that the conductor, while attending to his duty in lowering this step and raising the bar on one side of the car, saw that the passenger was in a position in which he could be injured by the lowering of the step. The evidence was that the whole occurrence—the arrival of the car, the change in the side bars and steps, the rush of the passengers to board the car—all took but a very few moments; and the first appellate division of the supreme court of New York says that this would seem to be a case in which the accident was caused by the act of the passenger in attempting to board the car before it was in such a condition that passengers could safely board it. Continuing, it says that he took the risk of an injury incident to the condition of the car when he attempted to board it. He acted upon the assumption that the step was down without making any investigation as to its actual condition, and without waiting for an investigation from the conductor, with knowledge of the fact that this change in the fixtures of the car was necessary before the car could proceed on its return trip. The fact that other passengers rushed to board the car was not sufficient to justify him in assuming that the car was in a condition that would enable him to board it in safety. And the court does not think that it would be justified in holding the company liable for an injury which resulted from the passenger's attempting to board the car before the necessary changes had been made which he knew had to be made, when an inspection would have disclosed the fact that the car was not ready for passengers to enter from the side from which he attempted to enter it.

RISK OF JERK ASSUMED BY PASSENGER PREPARING DURING STOPPING OF CAR TO ALIGHT—USE OF APPROVED PATTERN OR STEP.

Phillips v. St. Charles Street Railroad Co. (La.), 31 So. Rep. 135. Dec. 16, 1901. Rehearing denied January 20, 1902.

Where the motoneer of a street car, in answer to a signal, is slowing down his car in order to stop it with the rear platform over the proper crossing, and a passenger has taken his position on the lower step of the platform, preparatory to getting off, the supreme court of Louisiana holds that the fact that the passenger loses his balance, and falls to the ground, it being claimed that such a fall resulted from the sudden jerking of the car and from the passenger catching his shoe in a defective step, will not justify the conclusion that such fall should be attributed to the negligence of the carrier, when it appears that the irregularity of motion complained of was not greater than is usual in the stopping of street cars, and that the step was of an approved pattern, and without discoverable defects. It may be, the court further says, with reference to this case, that the motoneer had slightly miscalculated, and that it become necessary just then to accelerate the motion of the car in order that the rear platform might be exactly over the crossing when the car should stop, and that the passenger resting, possibly, on one foot, was taken by surprise by the forward movement, and lost his balance. But slight irregularities of movement are common incidents in the starting and stopping of street cars, and those who prepare to alight and who do alight whilst the cars are in motion assume the risks resulting from such irregularities.

ADMISSIBILITY IN EVIDENCE OF CONDUCTOR'S TRIP REPORT.

Callihan v. Washington Water Power Co. (Wash.), 67 Pac. Rep. 697. Jan. 4, 1902.

It being in dispute whether a party had been a passenger on a certain car or not, she claiming that she had been and that her fare had been paid with a transfer slip, the conductor was called as a witness and testified, as a matter of independent recollection, that he had eight passengers for the trip all of whom paid cash fares, and that no transfers were taken, excluding by his identification of the passengers the party referred to. He then further testified that at the end of the line he made a written report, showing the number of passengers carried, and the fares paid—whether cash or transfer—and that this report was, in regular course, and as was his custom, turned into the company. This report was then offered in evidence. The instrument purported to show the number of passengers carried by the conductor on his respective trips on the date in question, and the medium in which their fares were paid, and that on the particular trip in question he had eight passengers, all of whom paid cash fares. The introduction of the report was objected to. It was conceded that the conductor in this instance would have had a right to have examined the report for the purpose of refreshing his memory, but it was contended that, having testified independently of the memorandum, the introduction of the memorandum was equivalent to the admission of declarations previously made, which would be self-serving in their nature. But, after an extensive examination of the law involved, the supreme court of Washington holds that no error was committed in admitting the report in evidence. It does not consider that under the circumstances it could be self-serving. Moreover, it says that so pertinent and convincing was this character of testimony in this particular case, that, if it had not been offered, the company might have felt that it was in danger of being subjected to a telling criticism before the jury for omitting to produce for its consideration convincing evidence resting peculiarly within its own knowledge, the omission of which would raise the presumption, or at least a strong suspicion, that such evidence, if adduced, would operate to its prejudice.

RIGHT TO USE STREETS AND TO CROSS STEAM RAILWAY TRACKS—STEAM RAILWAY CANNOT ENJOIN CROSSING OR QUESTION VALIDITY OF ORDINANCE.

Atchison, Topeka & Santa Fe Railway Co. v. General Electric Railway Co. (U. S. C. C. A.), 112 Fed. Rep. 689. Jan. 7, 1902.

The doctrine is firmly established in the state of Illinois, in accordance with the general weight of authority, the United States circuit court of appeals, seventh circuit, says, that by the construction and use of street railway tracks no additional burden is imposed upon the easement, as such use falls within the purposes for which streets are dedicated or acquired; but that the use for steam railway purposes is beyond the general public easement, or right of use, and imposes an additional servitude. It is equally well settled by the uniform line of decisions in Illinois that the use of a street by a steam railway is legitimate when duly authorized, but that no exclusive use is conferred by the permit, and it can only be enjoyed in common with the use of the street by the public as an ordinary highway, and without materially impairing its usefulness as such.

With the rights of a steam railway in a street crossing thus defined, the court holds that they are in subordination to the use for street purposes, which includes use for a street railway. The right is held in common, is "joint and mutual, not exclusive;" and the primary object of the street is for ordinary passage and travel, of which the public and individuals cannot rightfully be deprived. The proposed use in this case of a street in such a crossing for a street railway, the court goes on to say, was within the public purposes of the street, and imposed only the burden to which the steam railway crossing was subjected by the permit. For such crossing of the steam railway tracks at grade by a street railway damages were not allowable for increased delay or danger in crossing. Furthermore, the court pronounces it plain that a bill could not be maintained on behalf of the steam railway company to enjoin the construction and use to that end. The adjudications in Illinois, it says, are conclusive that the question whether the ordinance was either fraudulently obtained or invalid could not be raised by the steam railway company.

SLOWING DOWN SPEED.

Rapid Transit Railway Co. v. Lusk (Tex. Civ. App.), 66 S. W. Rep. 799. Jan. 25, 1902

This was an action for personal injuries received by a passenger who testified that, in attempting to step from a trolley car to the side step, with a view of alighting, he was, by reason of a sudden jerk of the car, thrown therefrom, and he contended that the speed of the car was being slowed down to enable him to alight at the place where he attempted to alight. On the other hand, there was evidence tending to show that by the rules of the company the cars only stopped at the far side of cross streets, and the company contended that the slowing down of the speed of the car was for the purpose of bringing it under control so that it could be stopped at the usual stopping place, the far side of a cross street. There was evidence tending to support each of these contentions, and the court of civil appeals of Texas holds that it was reversible error to assume, in charging the jury, that the object of slowing down the car was to enable the passenger to alight.

If it was the custom and rule of the company, the court holds, to stop its cars only at the far side of the cross streets for the purpose of taking on and letting off passengers, and such custom was generally known and observed by the company's agents and employes in operating the cars, and the purpose of checking the speed of the car was to bring the car under control so that the same could be stopped at the usual stopping place; and if the agents and employes of the company did not know that the passenger was attempting to alight from the car, or ought not to have reasonably anticipated that he or some other passenger might be in the act of getting off the car, and be injured as the result of a sudden movement of the car, then the company was not negligent in so slowing down the speed of the car. If, however, the slowing down the speed of the car was done in response to this passenger's notice that he desired to alight, and to enable him to alight, and in doing so the company did not use the proper care—that is, such care as a prudent and cautious person would have exercised under such circumstances—then it was guilty of negligence; and, if such negligence was the cause of the injury to this passenger, the company would be liable, unless the passenger himself was negligent, and his negligence contributed to the injury. These were questions of fact, which should have been settled by the jury under a proper charge.

INJURY OF PEDESTRIAN ON FALLEN FENDER ON REAR OF CAR.

Levison v. Metropolitan Street Railway Co. (N. Y. Sup.), 74 N. Y. Sup. 882. Oct., 1901.

A pedestrian walking east on a cross street at about 7 o'clock in the evening of a February day, when it was quite dark, in undertaking to pass immediately behind a car which had stopped just north of the north crossing stumbled and fell into the fender attached to the rear of the car, which in some way, not explained by the evidence, had fallen down. Instead of extricating himself, he was dragged some distance before the car was again stopped. When the accident happened the conductor was inside the car collecting fares. He consequently did not see the man fall into the fender, and did not know that he had so fallen when he gave the signal to start the car. The cross street was 125th street. The car had started from 106th street, and the fender was then folded up. At 116th street, nine blocks from the scene of the accident, the conductor had noticed that it was still folded up. The car was crowded, and from 116th street to 125th street the conductor was inside the car collecting fares. He therefore did not observe the fender between those streets, and did not know that it had fallen.

Upon these facts, the appellate term of the supreme court of New

York holds, the party had no cause of action against the company. He was not a passenger, but a traveler upon the highway, and the company's obligation to him must be measured by that circumstance. The company had a right to stop its car at the crosswalk, and it was not contended that it was so stopped at an improper place. The fender was not inherently a dangerous appliance, but, on the contrary, was a device carried for the protection of travelers. It did not appear that it was improperly constructed, or that its fastenings were, under usual conditions, defective or insufficient. The company was not chargeable with notice that it had fallen down, for no employe had seen it after it had fallen, and the evidence was that only a short time before it had been folded up. The mere fact that it projected behind the vehicle did not necessarily impute negligence to the company, in the absence of actual or constructive notice of it. Upon the party's own evidence judgment was properly rendered in favor of the company.

CONTRIBUTORY NEGLIGENCE IN CROSSING ELECTRIC RAILWAYS IN OPEN COUNTRY—ELECTRIC COMPARED WITH STEAM RAILWAYS—MOTORMAN NOT TO EXPECT PERSON TO LEAVE PLACE OF SAFETY.

McNab v. United Railways & Electric Co. of Baltimore City (Md.), 51 Atl. Rep., 421. Mar. 6, 1902.

At a place in the open country where the tracks of a street railway were built like those of a steam railway, a T-rail being spiked to cross-ties and the roadbed ballasted with broken stone, on which cars ran at a speed of from 20 to 25 miles an hour, a woman driving a horse slowed down as she approached the tracks from a cross street, but, seeing no car on the track nearest to her and hearing no gong sounded, drove forward, when, as the horse got in the space between the two tracks, she saw a car approaching at a high rate of speed on the farther track, not more than 40 feet away, and, instead of stopping or turning the head of the horse aside, she gave the horse a stroke with the whip and attempted to cross the track in front of the car, which struck the rear wheels of the carriage. This, the court of appeals of Maryland says, was sheer recklessness. No matter how negligent the company's servants may have been in failing to give signals or warnings of the approach of the car to the crossing, the woman, after she saw the danger of leaving a place of safety and of attempting to cross directly in front of the rapidly moving car, was, when she drove forward, equally guilty of negligence, which immediately contributed to the infliction of the injury which she sustained; and that contributory negligence was a bar to a recovery of damages on her part.

But it was suggested that, however this might be had the collision occurred at the intersection of a steam railroad track and a public highway, it could not be the law of this case, because the injury was inflicted by an electric railway car. The reply of the court is that it is not because of a difference in motive power employed upon a steam and an electric railway, but because of other circumstances, that acts which would be regarded as acts of contributory negligence in the one instance would not be so treated in the other. It is far more dangerous to attempt to cross in advance of a car moving at a high rate of speed, whether propelled by steam or electricity, than to make a like attempt when the car is moving along the streets of a city at a very moderate rate of speed. The difference in the method of the construction of the tracks in the country from that in the city, the very marked difference in the speed attained in the one locality from that tolerated in the other, the adaptation of city streets to the use of pedestrians and vehicles of all kinds as well as to the cars, are all circumstances, wholly apart from what the motive power propelling the cars may be, which must be considered in determining whether a given act is or is not an act of contributory negligence. Thus to drive across a street car track at the intersection of two streets in a city, where the rails are flat and offer no resistance, might not be an act of contributory negligence, even though an approaching car going at the rate of six miles an hour, but required to stop or slow up on the near side of the intersected street, were but 40 feet distant; but to make the same attempt in the country, where T-rails themselves interpose obstructions, and where the car is running at the same high rate of speed which cars propelled by steam attain, would be just as clearly an act of contributory negligence as it would be were the car being moved by steam power instead of by electricity. A car making 6 miles an hour can be slowed or stopped much more promptly than when making 25 miles an hour, and this circumstance is of considerable importance in determining whether an attempt to cross in front of it is an act of contributory negligence. It is the relation which the act done bears to the final result in the light of all the attendant circumstances that determines whether the act done is or is not one of negligence or contributory negligence. The conditions as to construction, location and speed and the danger incident to crossing the tracks being precisely the same in this instance as they would have been had the motive power been steam, the legal principles defining contributory negligence could not be different merely because the motive power was electricity.

Furthermore, the court holds that when the motorman saw (and it says that it may be presumed that he did see, because he could have seen) that the woman was in a place of safety, he was under no obligation to assume that she would deliberately leave that place and drive into the jaws of danger.

MAY REFUSE TO ACCEPT DETACHED COUPONS—PASSENGER GETS NO RIGHTS FROM RINGING UP OF UNPAID FARE—OBLIGATION TO PAY FARE—DEMAND OF FARE NECESSARY BEFORE EXPULSION—SECOND DEMAND OF FARE NOT REQUIRED.

United Railways & Electric Co. v. Hardesty (Md.), 51 Atl. Rep., 406. Mar. 6, 1902.

A wife purchased in her own name a 20-trip coupon book, which was issued at a reduced rate, the purchaser agreeing in consideration thereof to comply with the reasonable regulations of the company. The book declared that each undetached coupon would entitle the owner, naming her, a householder, or member of her immediate family, or a servant therein, to ride, between certain points, and in accordance with the conditions of the contract in the back of the book. It was further stipulated on the coupons that they would not be "good unless detached by the conductor." The woman and her husband used this coupon book going one way, after which he tore out coupons for a return trip and handed the book to her, and later, on the same day, but not in company with her, he boarded a car going to his home. He testified that the conductor took one of the detached coupons, rang up the fare, and said that the book would have to be shown, which he was told could not be shown.

It is clear and undisputable, the court of appeals of Maryland thinks, that the husband had no right whatever to ride on the detached coupon. It says that it was not an ordinary railway ticket. Under the specific terms of the contract embodied in the ticket, a detached coupon was wholly void. That was a regulation which the company had the power to make, and one to which the purchaser of the ticket agreed. As a token of the holder's right to ride on the car, the detached coupon was of no more value than a slip of blank paper would have been. The holder of the coupon was bound to know this, and he was equally bound to know that the tender of a detached coupon, even if taken up by the conductor, was no more a payment of the car fare than the tender and acceptance of a counterfeit coin would have been. As the detached coupon was void by the very terms of the contract, it was no ticket; and as the holder had, therefore, presented no ticket at all, he obviously had no right to ride on the car unless he paid his fare. The fact that the conductor had rung up the void coupon, as though it had been a valid coupon, did not make it what it was not, and clearly did not give the passenger a right to be transported, when his right to be carried on the car depended altogether on his complying with the rules by paying his fare, and did not depend on the fact that the conductor had rung up the fare, as paid, when it had not in reality been paid. He was not, therefore, entitled to be carried as a passenger.

Then, the question was whether, having once demanded the passenger's fare, and having received a worthless ticket instead of the fare, the conductor was legally bound to make a second demand before removing the passenger from the car. The court holds that he was not. It says that it is a matter of common knowledge, of which the court will take judicial notice, and of which the public is bound to take notice, that railroad passenger trains are operated to carry passengers for hire. There were but two ways in which the passenger could pay—either by ticket or in cash. When he tendered the one, and was informed that it was insufficient because detached, he knew just as well as the conductor that his right to remain on the car depended on his doing the only other thing he could do, viz., paying his fare in cash. If he knew this—and he was bound to know it, and therefore must be held to have known it—what possible reason could be assigned for holding, as matter of law, that the company, through its conductor, was legally bound to ask the passenger to do precisely what the latter knew he was obliged to do? And how could the failure of the conductor to ask the passenger to pay a fare, which the passenger was well aware he was required to pay if he wished to remain on the car after he had refused to exhibit the book, relieve the passenger from the obligation to voluntarily pay the fare?

The right of a carrier of persons to collect fares and to receive them, the court continues, does not depend on the fact that the conductor or other servant demands the fare. The right to collect and receive fare arises out of the circumstance that the passenger enters the conveyance for the purpose of being carried therein. By entering the conveyance for that purpose he agrees to pay the fare, and the duty to pay it is thereby imposed. Morally and legally he is as much bound to pay the fare when not demanded as he is when it is demanded of him, because the duty to pay has not its origin in the demand for payment; and a failure to demand it cannot, consequently, be treated as giving him a right to be transported gratuitously. This being so, the primary and continuing obligation is obviously on the passenger to pay the fare. The demand for it by the carrier is made with a twofold view, viz.: First, for the convenience of the passenger, to save him the annoyance of himself seeking the conductor to deliver the ticket or fare to the latter; and, secondly, for the protection of the company against individuals who would not scruple to ride without paying if they could evade making payment. But neither of these considerations can be converted into or treated as a requirement that when a demand has been once made for a fare, and has not been complied with, or, what is the same thing, has been complied with by the delivery of a worthless ticket, which the holder was bound to know was worthless, the conductor must make a new demand before the passenger can be expelled.

While the duty to pay fare does not originate in or rest upon the demand for it, there can be no expulsion of a traveler for not paying until he has refused to pay, and there cannot be a refusal until there has been a demand of some kind. In this case, there was a demand; but there was no second demand, which, as before stated, the court holds was not necessary to be made before the expulsion of the passenger. A railroad company, the court says, may eject from its accommodations all persons who refuse compliance with its reasonable regulations. This has been so often announced by the courts that it may be said to have become axiomatic law. A condition printed on a reduced rate ticket to the effect that a coupon affixed thereto shall be invalid unless detached by the conductor is undoubtedly a reasonable regulation. An attempt to use a previously detached coupon, and a refusal to exhibit the book from which it had been taken, clearly forfeit the right of the holder to proceed farther on the car. If his right to remain on the car is thus forfeited by his own act, it was lawful to eject him, and he could avoid expulsion only by paying or offering to pay his fare. Therefore, if he wished to remain in the car, the duty was on him to tender his fare to the conductor, in the absence of any rule of the company requiring the conductor to demand the fare. Again, the court says that the passenger had ample opportunity to pay the fare, which it was his duty to pay when he declined to show the coupon book. His attempt to ride on a worthless ticket did not impose upon the conductor an obligation to make a second demand for the fare, but did require the holder of the ticket, if he wished to avoid being ejected, to himself make tender of payment. As he was in the wrong throughout, he had no cause of action against the company, and the case should have been withdrawn from the jury.

DUTY OF TRAVELER ON HIGHWAY CONTAINING TRACK AS TO LOOKING FOR CAR—MAY ASSUME MOTORMAN WILL MAKE SOME EFFORT TO PREVENT COLLISION.

Tunison v. Weadock (Mich.), 89 N. W. Rep. 703. Mar. 26, 1902.

One traveling on a public highway on which there is a street car track is bound, the supreme court of Michigan holds, to use some caution. If he is turning to drive across the track, he is bound to see whether a car is liable to come in collision with him. He is undoubtedly bound to look ahead for the same purpose. But the court is not prepared to hold that he is, as a matter of law, bound to be constantly looking backward when driving upon or in proximity to the track. He has a right to assume that some effort will be made by the motoneer to prevent a collision; that he is in a position to see in advance, and to note whether a collision is likely if he continues in the course. In this case there was evidence from which it might be found that for a considerable distance, at least, the vehicle in which the party suing was traveling was pursuing a course near the railway track,—so near as to make it reasonably certain that a collision would occur if the car was not brought under control. Under such circumstances it cannot be said, the court declares, that the motoneer had the right to pursue his course, and run this vehicle down.

ATTEMPTING TO CROSS TRACKS WITH CAR ON FARTHER TRACK CLOSER THAN ONE ON NEARER TRACK.

O'Callaghan v. Metropolitan Street Railway Co. (N. Y. Sup.), 75 N. Y. Supp. 171. Mar. 14, 1902.

The party suing was injured on the southerly crossing of Amsterdam Avenue, in Manhattan, at 104th St., being caught between an uptown and a downtown car. It was in the daytime, and she was crossing the avenue from the west. Before attempting to cross she looked up and down the avenue. From the south a car was coming up, and was then a little above 103d St. From the north a car was coming down, and was then at 106th St. When she had crossed to downtown track, the uptown car was so close to her that she could not cross that track with safety, and while she stood between the tracks waiting for that car to pass the downtown car came along quite fast, and without the warning of the gong, and the injury was occasioned. The question of the company's negligence was scarcely raised upon the trial. No witnesses were examined upon the trial, and the second appellate division of the supreme court of New York says that no discussion was necessary to establish the fact that a jury might find negligence from the circumstances presented by the record. Whether the woman was guilty of contributory negligence was a question of fact. She was not bound to assume that it would be dangerous to attempt to cross a street with a car on the nearer track two blocks away, or that that car would come upon her without warning before another car less than half the distance from her would pass upon the farther track; and whether, under such circumstances, she failed in the exercise of ordinary care, was clearly for the jury to determine. A judgment in favor of the party suing affirmed.

INJURY TO CONDUCTOR RIGHTFULLY ON INSIDE RUNNING BOARD WHERE TRACKS ARE TOO CLOSE TOGETHER—NO CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

True v. Niagara Gorge Railroad Co. (N. Y. Sup.), 75 N. Y. Supp. 216. Mar. 11, 1902.

Here a conductor who as such had been in the employ of the company for 30 days on a road about 7 miles in length was very seriously injured when at a place where the inside rails of the two tracks were but 3 ft. 10 in. apart, the close proximity of the tracks continuing for about 160 feet. The car was an open one, the seats of which extended entirely across it, and were so close together that it was inconvenient and even impracticable for the conductor to crowd in front of the passengers, between the seats, to collect the fares. The verdict of the jury, the fourth appellate division of the supreme court of New York says, showed that the conductor was riding on the running board of the car in the usual manner, engaged in the performance of his duties in accordance with the instructions given him. He was in the proper place to collect his fares, and was not aware that while he was on the running board he was in danger of being hit by a passing car. The tracks were dangerously close together at this point, not caused by any tapering to unite, for both north and south of the place of the accident the space widened; but the narrow space was probably due to some oversight, for they were removed farther apart after the accident, and apparently to avoid the recurrence of a like catastrophe. It may be added that jutting rocks along where the accident occurred rendered it impossible for him to perform his duties on the running board on the other side.

Under these circumstances the court affirms a judgment in his favor.

It was not important, the court says, whether, when struck by a car on the other track he was standing on the running board, or passing around one of the standards, as long as he was in the line of his duty, performing it in the ordinary manner, and not cognizant of any danger to be apprehended from the passing car. It was the duty of the company to furnish a reasonably proper place for him to carry on his work. Nor could he be charged with want of care, as matter of law. He was insensible of the danger. It was not observable to him from the car. He had received no warning of it. He was in the discharge of his duties in the ordinary way, and his mind was engrossed in their performance. Again, the court says that this was not a risk which he assumed. It was not an incident to the business; was not manifest, but was due to the oversight of the company, which proper caution would have prevented. The employer must, to a reasonable degree, perform the obligation resting upon him to safeguard the interests of his employes, before the latter can be charged with assuming the risk with reference to the especial thing which should have been remedied. Assumption of risks must rest upon knowledge upon the part of the servant, or the means of acquiring it by the exercise of ordinary diligence.

RIGHTS OF PASSENGER AT WHOSE REQUEST CAR HAS COMMENCED TO SLOW UP.

Crow v. Metropolitan Street Railway Co. (N. Y. Sup.), 75 N. Y. Supp. 377. Mar. 21, 1902.

After the car had commenced to slow down at a passenger's request, she had a right, the first appellate division of the supreme court of New York holds, to prepare to leave the car; and she also had a right to assume that the conditions existing at that time would be continued until the car had been stopped, and she had been afforded an opportunity to get off.

DUTY AS TO SELECTION OF SAFE PLACES FOR PASSENGERS TO ALIGHT.

Sweet v. Louisville Railway Co. (Ky.), 67 SS. W. Rep. 4. Mar. 12, 1902.

It is stated, and it seems to be true, the court of appeals of Kentucky says, that a different duty attaches to street railway and to steam railway operators in respect to furnishing safe places for discharging their passengers. The latter must furnish such, while the former is under no such obligation, but discharges its passengers at convenient points along the streets it traverses. If the street at the place of discharging the passenger presents a dangerous condition to one alighting there, and such danger is obvious to the passenger, the carrier is not liable to him for injuries received from such defects. But where the danger is known, or is such as must have been known, to the carrier, and is unknown to the passenger,—as where, because of the darkness, he cannot see it,—the carrier is bound to warn the passenger of the danger, or to assist him in safely alighting, or stop the car at a point beyond or short of the dangerous point. Its failure to take one of these precautions renders it liable to the passenger sustaining injury because of such neglect. While the street railway company is not bound to furnish safe places for depositing its passengers, it is bound to either select them or to warn the passenger of the conditions.

In this case, it was dark when a car stopped at or near the usual street crossing, and a passenger severely injured her ankle in attempting to alight. The evidence disclosed that the street in question was a macadam road, which had become so worn at that particular point that a depression was formed two or three feet in length, and six inches deep. It was at the edge of the company's track, and so near it that one stepping from the car would be apt to step into it. It was easily to be seen in the light. Whether it was the cause of the passenger's injury, or was such a defective place for discharging passengers as to render it obviously unsafe, the court holds, were questions of fact that should have been submitted to the jury.

EFFECT ON LIABILITY FOR DEFECT IN PAVEMENT OF TRANSFER BY CITY TO PAVING COMPANY OF DUTY TO CARE FOR SAME.

Welch v. Syracuse Rapid Transit Railway Co. (N. Y. Sup.), 75 N. Y. Supp. 173. Mar. 11, 1902.

A passenger broke her ankle in stepping from the running board of an open car into an unobserved hole or depression in the asphalt pavement at the place the car stopped. This depression was 4 feet 6 inches long; its greatest width, 1 foot 5 inches; and its greatest depth, 3 inches. The edges were beveled and somewhat ragged. The inner edge was 1 foot 5 inches from the outer rail. The jury was instructed, among other things, that by statute (section 98 of the railroad law) the duty was imposed upon the railway company of maintaining the street "two feet in width outside of its tracks" in a reasonably safe condition, and if the place where the passenger stepped in alighting from the car, and which caused her to fall, was within that space and was dangerous, the company was chargeable with negligence for having neglected to repair the defect in the pavement. To meet this proposition, the company offered in evidence a resolution adopted by the common council of the city, and approved by the mayor, which gave a paving company permission to take up certain pavement, which included that which had been at the place of the accident, and at its own expense to lay a new pavement, and to keep the same in repair for five years, to be done in accordance with plans and specifications of the city engineer, and subject to the approval of the commissioner of public works of the city. The fourth appellate divison of the supreme court of New York holds that the resolution should have been received in evidence, at least for the purpose of enabling the jury to say whether or not, in view of it and under all the circumstances, the railway company, through its agents, was negligent in not determining that the defect in the street was dangerous, and in not repairing it; and that the exclusion of the resolution was reversible error.

The purpose of the resolution was evidently to enable the new pavement to be tested, to ascertain its durability and wearing qualities; and it is apparent, the court says, that if the railway company or any other corporation could make repairs at will, such test would be useless. By the charter of the city the mayor and common council were given authority to lay out, make, open, regulate, repair, and improve highways and streets; and the council was given authority to order the construction and repair of pavements, and defray the expenses thereof by assessment upon the abutting property owners. Section 98 of the railroad law does not in any manner deprive the city authorities of any of the powers conferred upon them by the charter. The city had the right, acting through its officers or through any other agency, to do with the pavement in question precisely as it saw fit, provided it did not unnecessarily and improperly interfere with the rights of the railway company. It had the right to withdraw from the company the power to in any manner interfere with the pavement upon the street, or to relieve it from the duty imposed by statute, provided other means were adopted which would better or equally well protect the interests and rights of the public. By the action on the part of the city the company was relieved from the obligation during the period of five years of keeping in repair the portion of the street in question. Besides, the resolution was competent upon the question of the company's negligence, even if it was not relieved of its obligation to keep the street in repair by reason of the city's action in the premises. The company had a right, in determining whether or not the defect was dangerous, to take into consideration the fact that the city authorities had taken control of the street, and to assume that they did not regard it as being in a dangerous condition, because of the fact that they had taken no steps to repair or cause the same to be repaired. The jury had a right to say not only whether the company was negligent in permitting the defect described to exist in the street, as an independent proposition, but also to say whether it was negligent in so doing, in view of the fact that by the resolution which was offered in evidence the city had contracted with the paving company that that company, and not the railway company should keep such street in repair, under the direction and supervision of the municipal officers.

JUMPING FROM CAR UNDER APPARENT NECESSITY ONLY—NO DUTY TO FIRST INFORM DRIVER—ADMISSIBILITY OF ORDINANCE REQUIRING CARS TO STOP AT RAILROAD CROSSINGS.

Selma Street & Suburban Railway Co. v. Owen (Ala.), 31 So. Rep. 598. Dec. 18, 1901. Rehearing denied Jan. 30, 1902.

This was an action brought by the latter-named party to recover damages for personal injuries. It was averred that as a street car upon which she was seated was driven onto a railway track, at a crossing, an engine came running forward on that track at a high and rapid rate of speed, and was about to run into the car; that the driver became terrified, and exclaimed to her: "We are going to be killed. The train is on us," that she thereupon, startled and frightened by hearing the frantic cries of the driver, jumped from her seat, and seeing the engine coming at a high rate of speed, and that it was about to collide with the car, and being thereby still more frightened, she attempted to jump off, and received the injuries of which she complained in jumping off or in being thrown off by a quickened movement of the mule drawing the car, while she was endeavoring to get off. The engine was stopped 20 or 25 feet from the car.

The passenger, the supreme court of Alabama holds, was under no duty, before jumping from a car about to be run over by a locomotive, to inform the driver that she wished to alight. It was immaterial whether the driver, when he caused the mule to quicken its pace, knew that she was about to jump from the moving car. The complaint made no claim on account of the driver having caused the mule to quicken its pace, the averment in that regard being descriptive of the occurrence.

The averments that the engine was coming toward the car at a high rate of speed, and was about to collide with or run into the car, the court says, were to be taken to mean that such collision was imminent; that the engine was near to colliding with the car; that it appeared to be on the point of collision. By such averments, and this construction or interpretation of them, a case was made of apparent necessity for the passenger to jump from the moving car. A reasonably apparent necessity for a passenger to leave a moving car, produced by the negligence of the carrier, stands upon the same footing as a real necessity so produced, and the rights and liabilities of the parties are to be adjudged accordingly. This necessity was a link in the unbroken chain of causation, beginning with the driver's negligence, and culminating in the injury. In legal effect, it was as if the links in the chain were discarded,—as if the passenger had remained on the car, and received her hurts from actual collision between the engine and the car. The negligence, in contemplation of law, operated as directly to the infliction of the injury in the case alleged as in the case assumed. In both the injury was the proximate result of the negligence. It was manifestly no defense to such a complaint that the passenger was in no actual peril when she jumped from the car, and was therefore guilty of contributory negligence in leaving the moving car. But the court holds it was reversible error to refuse to give the jury an instruction that, if the passenger, on the occasion complained of, acted in a manner which an ordinarily prudent person would not have acted, and this conduct was the cause of, or contributed materially to, her injury, she could not recover. Of course, her conduct, in respect of being prudent or negligent, was to be judged of by reference to all the circumstances surrounding her at the time, and these circumstances the court conceives to be fairly submitted to the jury in this instruction.

A city ordinance requiring all drivers of street cars to bring their cars to a complete stop before going on or driving over any railroad in the city the court holds was properly received in evidence.

INJURY OF BOY ATTEMPTING TO BOARD CAR AT FRONT END WITH VESTIBULE DOOR CLOSED—DUTY OF MOTORMAN—RUNNING BACKWARDS WITHOUT CHANGING HEADLIGHT OR FENDER.

Barlow v. Jersey City, Hoboken & Paterson Railway Co. (N. J. Sup.), 51 Atl. Rep. 463. Feb. 24, 1902.

On the return run of a large vestibuled electric car it went for a few blocks reversed from the outward run, and then, by means of a Y in the tracks, was turned around so that the front and rear would be as before. On this short backward run, while the conductor and motorman changed places, and the trolley pole was turned, the fender and headlight, when in use, were not disturbed. At about a quarter before 6 o'clock, one evening in November, just after the car had started on this return run, a boy who would be 12 years old in the following January, and who had been selling newspapers near the terminus, sprang on the step on the right-hand end of what was then temporarily the front platform, with the purpose, as testified, of paying fare as a passenger and riding to his home. He went to the front platform, he said, because it would be eventually the rear platform, and he expected to find it open, as it sometimes was at this terminus. He further testified that he rapped on the door, and that the motorman looked toward him, but did not open the door, or stop the car, or lessen its speed. Shortly afterward, the car collided with a wagon, and he was thrown off by the jar and injured.

Under these circumstances, the supreme court of New Jersey holds that the boy was properly nonsuited in an action brought to recover damages, because the company owed him no duty except to abstain from willful injury. It says that he was in no sense a passenger. He got upon the car at a place where he must have seen, if he had looked, that ingress was barred. That sometimes, in the company's cars, the door at that place was left open, and that passengers were allowed to enter there before the car started, did not excuse him from looking to see if an invitation by an open door was then extended to him to enter there. He knew that the rear platform was the proper place to enter a car, and his excuse that the platform he tried to get upon would eventually be the rear one only emphasized that knowledge. It should be noticed, too, that when the car would be turned, so as to make it the rear platform, the proper place of ingress would have been on the opposite side of the car from that on which the boy attempted to enter it.

If the motorman saw the boy on the step, he owed him no duty but to abstain from willful injury. He was not legally called on to open the door. His attention might be needed in the operation of the controller and brake and in keeping a lookout, especially as he was running without headlight or fender. If it was urged that he was negligent in running his car without those protections, or in not observing that the wagon with which he collided projected over the path of the car, it was sufficient answer to say that only passengers properly in or upon the car or persons lawfully using the highway could have had legal cause to complain of such negligence. The court says that it has never held that to one who jumps on a moving car at a place where he has no right to expect ingress to be afforded, either conductor or motorman owes a duty to stop the car or to lessen its speed, although it has held that where an attempted entrance was at a place where it need not have been looked for, yet, if it was seen, the conductor ought not to have started the car when he saw a passenger getting upon it with precarious footing. In this case, if the motorman in fact saw the lad, common humanity should have prompted him to do one of these things in order that the danger of the situation might be averted; but legal duty chargeable to the master was a very different matter.

The youth of the boy, the court holds, gave him no extraordinary right of protection. It has, indeed, it says, been held that care may be due to children getting on street cars that is not due to persons sui juris, or under no legal disability. But this boy was of sufficient age and intelligence to be held to the general rules applicable to adults.

NOTE PAYABLE AFTER COMPLETION OF ROAD—REASONABLE TIME FOR COMPLETION—PREREQUISITE TO RECISSION OF CONTRACT—USE OF OTHER TRACKS A SHORT DISTANCE—SINGLE TRACK AT CORNER FOR DOUBLE-TRACK ROAD.

Los Angeles Traction Co. v. Wilshire (Cal.), 67 Pac. Rep. 1086. Feb. 28, 1902.

A note dated July 19, 1895, was made payable to the traction company thirty days after the completion of its double track street railway to a certain point. On the faith of this and other similar promises of property owners, the company, in November, 1895, bid and paid the city $1,505 for a franchise to construct the road. Before April 28, 1896, it commenced work upon said railway, though such work was not performed with the view of prosecuting the construction of the railway continuously and with diligence to completion, and the company did not so commence work upon the railway with said purpose until after July 1, 1897. On that date, the makers of the note mentioned served upon the company a written notice to the effect that they did not recognize any liability, for the reason that the road had not been completed within the time agreed upon. Soon after the service of this notice, the company actively engaged in the construction of the road, and completed it, and commenced operating the same to the point stipulated, before the expiration of the year 1897. Thereafter, and on May 17, 1898, it completed its railway to another point prescribed in the conditions on which the note was placed in escrow. Upon these facts the company obtained judgment on the note, which is affirmed by the supreme court of California.

It was contended that, even without any agreement as to the time for the completion of the road, it should have been completed within a reasonable time. Admitting, for the purpose of the case, that the question of reasonable time was properly before the court, still, the supreme court says, it was a question to be decided on the evidence presented, and the condition of the evidence in that respect was aptly illustrated by a quotation from the opinion of the trial court as follows: "Whether or not this road was completed within a reasonable time must certainly depend upon the character of the enterprise, the obstacles to be overcome, the length of time required by diligent and proper effort to do the work. This would include an inquiry into the topography of the country, the amount and kind of the work necessary to make the improvement. Courts do not take judicial notice, however, of topography or of the physical condition of the streets and the town. There is no testimony which would indicate the length of time reasonably required for this work; hence I am unable to say that the same was not completed within a reasonable time, even though we have this great lapse between the granting of the franchise and the completion of the road."

The contract at the date of its making, the supreme court says, was unilateral, or one-sided, a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the traction company purchased and paid upwards of $1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had been partly performed, and the contract had taken on a bilateral, or two-sided, character, and if the makers of the note thereafter thought they discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the recission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason given for it was that the road was not constructed within the agrced time, when, as was determined subsequently by the court, there was no time agreed upon. Again, came too late, after the obligations of the parties had become fixed.

The traction company purchased the right to and used the track of another street railway company, that had been previously built, for a distance of some 1,800 feet, and it was contended that this was not a compliance with the contract to "build the road." But the supreme court thinks that the contract must be held to have been entered into with full knowledge of the law contained in section 499 of the civil code, which provides that two lines of street railway, operated under different managements, may be permitted to use the same street, but not to use the same street or tracks for a distance of more than five blocks consecutively. The contract, it holds, was complied with when this section was complied with, as to the portion of the line of railway affected by said section. Leaving out of consideration the foregoing statute, the court would say that the contract must receive a reasonable construction, and the company should be held only to a reasonable compliance therewith, and under this rule there was as little force in the contention based on the use of another company's track for a short distance as there was in the contention that the stipulation as to a double-track railway was not complied with for the reason that a single track only was constructed where the railroad turned a corner. The evidence was to the effect that this was the most practical and usual way to build a double-track street railway.

CONTRACT IN ORDINANCE FIXING FARES—EFFECT OF STATUTE GIVING MUNICIPAL AUTHORITIES POWER OF REGULATION—CITY ALONE CANNOT CHANGE FARE—WHAT ACT FOR FORMATION OF COMPANIES MAY COVER—EXTENSION OF FRANCHISES BEYOND LIFE OF COMPANY—POWER OF CITY UNDER RESERVED RIGHT TO MAKE RULES AND REGULATIONS.

City of Detroit v. Detroit Citizens' Street Railway Co. (U. S. Sup., Mich.), 22 Sup. Ct. Rep. 410. Mar. 3, 1902.

The Supreme Court of the United States says that it may be conceded that clear authority from the legislature is needed to enable a city to make a contract or agreement such as an ordinance providing for the consent of the city to the laying of tracks and the running and operation of a railroad through its streets, and fixing the rates of fare. But there can be no question in this court as to the competency of a state legislature. unless prohibited by constitutional provisions, to authorize a municipal corporation to contract with a street railway company as to the rates of fare, and so to bind during the specified period any future common council from altering or in any way interfering with such contract. The contract once having been made, the power of the city over the subject, so far as altering the rates of fare or other matters properly involved in and being a part of the contract, is suspended for the period of the running of the contract.

Under section 34 of the tram railway act of Michigan, as it was enacted in 1861, a railway corporation organized under the act could not construct a railway through the streets of a city without the consent of the municipal authorities, "and under such regulations and upon such terms and conditions as said authorities may from time to time prescribe." The court, although it does not deem it necessary to conclusively determine the question in this case, thinks that a reasonable construction of the language would seem to be that it did not and was not intended to give the right to the common council to change at its pleasure from time to time those important and fundamental rights affecting the very existence and financial success of the company in the operation of its road, but that by the use of such language there was simply reserved to the city council the right from time to time to add to or alter those general regulations or rules for the proper, safe, and efficient running of the cars, the character of service, the speed and number of cars, and their hours of operation and matters of a like nature.

Section 20 of the street railway act of Michigan of 1867 provided that the rates of toll or fare which any street railway might charge for the transportation of persons or passengers over its road, should be established by agreement between the company and the corporate authorities of the city or village where the road was located, and should not be increased without the consent of such authorities. Section 29 provided that "all companies and corporations heretofore organized in this state for the purpose of building and operating street railways under the statutes then in force shall have the same powers, rights, protection, and privileges, and shall be subject to all the liabilities, as are hereby provided for companies and corporations organized under the provisions of this act." In 1879, while this act was in force, a city ordinance was passed, supplementary to one of 1862, which provided for extensions by the railway company of its tracks through various other streets of the city, and also provided, among other things, for a special tax on the gross receipts of the several lines of railway operated by the company, payable to the city, and to be in lieu of license or other taxes and charges under the existing ordinances, besides which it provided that the powers and privileges conferred and the obligations imposed on the railway company by the ordinance of 1862 and the amendments thereto should be thereby extended and limited to thirty years from that date. Under these statutory provisions, and by the adoption of this ordinance, the court holds, a binding agreement was made and entered into between the city on the one side and the company on the other relating to rates of fare, and such agreement could not be altered without the consent of both sides.

That is, the rate of fare having been fixed by positive agreement under the expressed legislative authority by the rate of fare provided in the ordinance of 1862 having been made a rate under the ordinance of 1879, the subject was not open to alteration thereafter by the common council alone, under the right to prescribe from time to time the rules and regulations for the running and operation of the road. It may very well be, the court says, that language used by a legislature in merely conferring authority upon a company to fix certain charges for fare might not be regarded as amounting to a contract, when the same language used by parties in fixing rates under a legislative authority and direction to agree upon them would be regarded as forming a contract because the statute provided specially for that mode of determining them.

Nor does the court consider that the language of the ordinance, which provides that the rate of fare for one passenger shall not be more than 5 cents, gives any right to the city to reduce it below the rate of 5 cents established by the company. It says that it is a contract which gives the company the right to charge a rate of fare up to the sum of 5 cents for a single passenger, and leaves no power with the city to reduce it without the consent of the company. The language of section 20 in the street railway act of 1867, which provides that the rate of fare agreed upon shall not be increased without the consent of the city authorities, does not mean that the rate may be reduced without the consent of the railway companies, nor does it show the parties did not suppose there was a contract between them as to rates. That provision does not seem to perform any material function, because without it, the parties having agreed upon the subject of rates, it would follow that the agreement could not be altered by either party without the consent of the other. It may be that it was meant that the company, while unable to increase the rates of fare without the consent of the city authorities, had the right to reduce the rates as it might please it without consulting the city. It was probably inserted from abundant caution, but in no event can it properly or fairly be regarded as an implied permission to the city authorities to reduce the rates of fare as agreed upon without the consent of the railway company.

Narrowly considered, under a constitutional provision that "no law shall embrace more than one subject which shall be expressed in its title," an act to provide for the formation of street railway companies should contain nothing but provisions relating to their formation and organization, but, the court says, it would be absurd to hold that the constitutional provision would prevent the introduction into such an act of various details in regard to the corporations after their formation and in regard to their government, operation, regulation, and other matters which might be fairly considered as germane to the particular object named in the title of the statute. Hence, it thinks that it would be a most narrow construction of the constitutional provision to hold that under such a title it was incompetent for the legislature to provide that the benefits and obligations conferred and provided for in the act should be made applicable to corporations of a like character already organized and in operation. It is germane and appropriate to the subject-matter of the act, and to enact under such a title that all companies of the like nature should have the same privileges is fairly within the general object described in the title.

Again, the court sees no reason why the company should not take the extended term, as provided for in the supplemental ordinance of 1879, although the extension was beyond the then limit of its corporate life. It says that the extension formed a good consideration for the agreement on the part of the company to perform the obligations contained in the ordinance. If its life were not extended, the consent being assignable and transferable, particularly by statute, any company itself having corporate existence for that purpose could purchase the outstanding term and operate its road thereunder.

The reservation in an ordinance of the right from time to time to make such further rules, orders, or regulations as to the common council may seem proper, the court holds, cannot be held to extend to the alteration of a contract as to the rate of fare which shall be charged for the transportation of passengers,—does not include the right on the part of the city at its own pleasure to reduce the rates of fare agreed upon in the ordinance. What such a reservation permits is for the city to make further rules or regulations than those contained in the ordinance, in regard "to all matters incident to the construction and operation of the road, such as the location of the tracks in the streets, the placing of switches and turntables, the repair of the pavement between tracks, the removal or limitation of the number of tracks, in the interest of public travel, the frequency with which cars should be run for the public convenience, the stopping of cars at street crossings, the use of fenders, the rate of speed to be maintained, the sale of tickets, and generally to details of the conduct and operation of the railway, which experience might show to be necessary, in addition to or in amendment of those specified in the consent for the protection of life, the accommodation of the public, and the avoidance of injury to private property. Such regulations are not invasions of the contract rights of the company, and are just and reasonable."

ELECTRIC RAILWAY IN STREET AN ADDED BURDEN.

Peck v. Schenectady Railway Co. (N. Y.), 63 N. E. Rep. 357. Apr. 1, 1902.

The use of a city street for the purposes of a street surface railroad operated by electric power the court of appeals of New York holds, as a settled question in that state, imposes an added burden upon the property rights of the owners of the fee, subject to the public easement for street purposes.

ONE SEEING A MOTORMAN IS NOT GOING TO RESPECT HIS RIGHTS TO CROSS STREET FIRST MUST NOT TAKE CHANCES.

Schwanewede v. North Hudson County Railway Co. (N. J. Sup.), 51 Atl. Rep. 696. Feb. 28, 1902.

If it appears that the trolley car motorman is not going to respect your rights to cross the street first, you must wait, the supreme court of New Jersey holds, or you are guilty of contributory negligence if hurt. A person cannot take chances, and hold himself free from contributory negligence. There is a difference between an unforeseen peril and being overtaken by one recklessly incurred.

DUTY OF DRIVER OF VEHICLE TO LOOK FOR CAR UNTIL TRACK IS REACHED.

Pieper v. Union Traction Co. of Philadelphia (Pa.), 51 Atl. Rep. 739. Mar. 24, 1902.

A driver in a big, high-seated, two-horse wagon, with curtains all down the sides because it was raining, gave one look "out from underneath the cover" of his wagon, for a distance of 50 or 70 feet down the street, to see if a trolley car was coming, when he reached the flag crossing across the street, and seeing no car within the distance named, sat back in his wagon, satisfied that he could cross the track without being struck. The supreme court of Pennsylvania holds that he was properly nonsuited on the ground of contributory negligence. It says that it was his duty, when he was entering the street, to be on the lookout for the approaching car, and, when on the street, to continue to look until the track was reached. A single glance "out from underneath the cover" of his wagon down the street for but 50 or 70 feet was not such a looking as enabled him to see the danger into which he took his wagon an instant later; and this careless looking was in itself negligence. It was a mere heedless glance, and not an adequate performance of the duty required by the situation.

INJURY OF PASSENGER IN LOOSENING FOOT CAUGHT ON STEP IN ALIGHTING.

Howell v. Union Traction Co. (Pa.), 51 Atl. Rep. 885, Apr. 21, 1092.

The testimony of a passenger that when, in alighting, he had put one foot on the ground the other caught by the heel in the step of the car and he could not get it loose until he made a second effort with such force that it threw him down and he injured his kneecap, the supreme court of Pennsylvania holds, failed to disclose any negligence on the part of the company, and a judgment of nonsuit was properly entered.

MOTORMAN INJURED BY DEFAULT OF DRIVER OF BEER WAGON ENTITLED TO DAMAGES FROM LATTER'S EMPLOYER.

McCorkle v. Anheuser-Busch Brewing Association (La.), 31 So. Rep. 762. Mar. 17, 1902.

A street car propelled by electricity, and moving at a moderate speed, was run into at a corner by a covered beer wagon, the driver of which, occupying a seat from which his view upon either side was obstructed by the cover of the wagon, drove his mules at a brisk pace along the street which intersected the car tracks, and practically into the car, before looking up or down the track. Upon the facts proven, the supreme court of Louisiana holds, the driver was at fault, and the motorman was entitled to recover from the driver's employer for personal injuries resulting from the collision.

ADJOURNMENT WITHOUT FORMAL POSTPONEMENT OF ACTION ON FRANCHISE NECESSITATES A NEW NOTICE—STOCKHOLDERS ON BOARD GRANTING FRANCHISE.

Hough v. Smith (N. Y. Sup.), 75 N. Y. Supp. 451. Mar., 1902.

Under a statute requiring the local authorities to give public notice of the time and place when an application for consent to build and operate a street railroad shall first be considered, the supreme court of New York, special term, Fulton county, holds that jurisdiction to act upon the application is lost by an adjournment without date and without postponing the subject for future consideration, and no subsequent action thereon is authorized until notice is again given as in the first instance. Moreover, the court holds that good morals, as well as good law, unite in condemning as illegal any contract made with, or consent given to the applying corporation while any of its stockholders constitute a part of the board of trustees of the municipality.

AUTHORITY REQUIRED TO OCCUPY PUBLIC ROAD IN COUNTRY.

Norfolk Railway & Light Co. v. Consolidated Turnpike Co. (Va.), 40 S. E. Rep. 897. Mar. 13, 1902.

A street railway company cannot lawfully occupy a public road in the country, the supreme court of appeals of Virginia holds, unless it has authority to do so from the legislature, or from the county, where the power to grant such authority has been delegated to the county by the legislature. The authority must be by express enactment, or by implication so clear as to leave no doubt that it was granted. It cannot occupy a public road under a general authority to extend its lines not exceeding 20 miles into the country from the city limits. And this is true whether the proposed service be a commercial street railway or for the purpose alone of transporting passengers.

DUTY OF DRIVER OF VEHICLE APPROACHING TRACKS AS TO LOOKING FOR CARS.

Haas v. Chester Street Railway Co. (Pa.), 51 Atl. Rep. 744. Mar. 24, 1902.

The driver of an open carriage, the supreme court of Pennsylvania here holds, was not required to stop before attempting to cross a street railway track, but it was his duty to look, when in a place where he had a view of the track, in the direction from which a car might be expected to come, and to continue to look as he approached it. Ordinarily on a city street the house line is the proper place from which to look, and looking from a point back to the house line where the view is obstructed does not relieve from the charge of contributory negligence. But if the act of looking, commenced at a point back of the house line, continues when it is reached, and until the driver is so far committed to the act of crossing that it is more dangerous to attempt to stop than to go on, he has done all the law requires in that regard. When a clear view of the track for a safe distance cannot be had, it may be the duty of a driver to stop before crossing the track of a street railway. But this is not a fixed legal duty, as it is in the case of steam railroads; and, unless the necessity for this additional precaution is obvious, the question whether, under the circumstances, it should have been taken, is for the jury. The driver in this case had to look both ways, as a car might come from either direction on the single track. While he was advancing slowly, looking alternately west and east, a car running very rapidly came into view in one direction while his eyes were momentarily turned in the other. Whether, under the circumstances, he exercised due care, was for the jury, and a judgment in his favor is affirmed.

DUTY OF DRIVER IN COUNTRY TO LOOK FOR CAR UNTIL TRACK IS REACHED.

Keenan v. Union Traction Co. (Pa.), 51 Atl. Rep. 742. Mar. 24, 1902.

A driver, in the country, of a one-horse, covered delivery wagon stopped at a distance of about 35 feet from the track, climbed out on the swingletree far enough to get clear of the curtains, and look down the road, where he had an unobstructed view of 319 feet in the direction from which a car was coming, but seeing no car got back into his wagon and started his horse on a walk. The supreme court of Pennsylvania holds that at the close of his testimony a verdict was properly directed for the company. It says that had he leaned forward beyond the curtains, without getting out on the swingle-tree, and looked, he could have seen the car, and his failure to do so was negligence per se, or in and of itself. He did not continue to look until he reached the track, and yet that was his duty. Continuing, it says that it was urged that the rule that one about to cross a street railway track must continue to look until the track is reached relates only to electric roads in cities, and does not apply to the crossing of such railway tracks in the country, where the views are much more extended, cars pass less frequently, and the obstructions to travel on town streets are not encountered. The answer to this was that care must always be exercised. The degree required may vary, but want of care under the circumstances is always negligence. It is as much one's duty to look out for danger in the country as it is in the town. Trolley cars run into wagons carelessly driven, not only on the streets of a city, but on turnpikes and rural roads as well. The court has never said that the duty of continuing to look until the trolley or street railway is reached is not binding upon those driving teams in the country.

The same degree of watchfulness may not be required there as on crowded city streets, but it will never be held that there need be no care at all in the country, as there was not in this case, after the driver climbed back from the swingle-tree into his seat in the closed wagon, where he could not see, and started for the danger which he would have avoided if he had looked.

DRIVING ON AND ACROSS TRACKS—ATTEMPTING TO CROSS TRACKS AT NIGHT AFTER SEEING HEADLIGHT.

Metropolitan Street Railway Co. v. Slayman (Kan.), 68 Pac. Rep. 628. Apr. 5, 1902.

It requires no citation of authorities, the supreme court of Kansas, division No. 1, says, to prove that persons traveling upon a public street along or across a street railway are not held to the exercise of the same degree of care as when traveling along or upon or across an ordinary railroad. Public streets are intended for public travel, and one who drives a team upon them has the same right to use them as has the street railway company, subject, always, to the duty imposed by necessity upon such driver to turn out for, and not unnecessarily obstruct, the cars, and to use proper care to avoid colliding therewith. For that reason such driver may not undertake to cross the tracks of a street railway company so near a moving car as to impede its passage or incur danger of collision; but even if he does do so, in violation of his duty, and those in charge of the car discover his danger, it is incumbent upon them to check its speed, and, if possible, avoid an accident. If to the driver of a vehicle there reasonably appears to be sufficient time for him to cross the track before a moving car will, while running at its ordinary speed, arrive at the place of crossing, and if, in good faith, and in the exercise of due care, he attempts to so cross in front of such car, it cannot be said, as a matter of law, that he is so far negligent in making such attempt as that he cannot recover, should an accident occur because the car was running much faster than usual, and because no effort was made by those in charge of it to prevent disaster. The degree of watchfulness and caution requisite in any case to constitute ordinary care must be commensurate with, and measured by, the danger to be avoided.

Where the driver of a heavy wagon attempts to cross the tracks of a street car company at night, and, before doing so, looks both ways upon the track, and is unable to discover any car approaching, but does see the headlight of one, which he believes to be moving toward him at a distance of three or four hundred yards; and where the evidence justifies the jury in determining that such car was traveling at an unusual, reckless, and dangerous rate of speed, which fact such driver did not and could not know before starting to drive across such track; and when, by reason of such high rate of speed, and the failure of those in charge of the car to make any effort to stop it, such wagon is struck, and the driver is injured,—the question as to whether the latter was so far guilty of contributory negligence as that he may not recover, the court holds, is one of fact, for the jury, under proper instructions of the court. With reference to the statement in this case of the driver that he did not see the car, but saw a light which he took to be the headlight of a car moving towards him, the supreme court says that it thinks, under the circumstances, that the court would have been justified in regarding it as tantamount to an admission that he saw the car. Still it was not error for the court to submit to the jury the question as to whether he did in fact see the car, when he, in terms, denied having done so. However, this matter, the supreme court says, was unimportant, for the court plainly told the jury that if the party suing would have avoided the injury which he received, by the exercise of reasonable care and diligence, and he failed to exercise such reasonable care and diligence, and thereby directly contributed to the cause which produced his injury, they should render a verdict for the company. And in other instructions they were advised that, if he failed to exercise ordinary care to avoid a collision, he could not recover in the action.

LIABILITY FOR INJURIES CAUSED IN CASE OF RUNAWAY BY PROJECTING RAILS.

Gray v. Washington Water Power Co. (Wash.), 68 Pac. Rep. 360. Mar. 19, 1902.

A horse driven by a woman became frightened, and ran away. It turned into a street where there were street railway tracks, the rails of which were required by the grant of the use of the street to be kept flush with the surface thereof, but which projected above the surface of the street from one to three inches, and had done so for a considerable time. When the wheels of the buggy struck these rails at an angle, the woman mentioned and another one with her were thrown out, and the former severely injured. A jury returned a verdict in her favor, and the supreme court of Washington holds that it was error to grant a new trial on the ground that the running away of the horse and the loss of control of the horse constituted the proximate cause of the accident and injuries complained of. In other words, it does not think that the court could say, as a matter of law, in this case, where two causes united to produce an injury, which one of the causes was the proximate cause of the injury. The correct rule of law was stated, and the question properly submitted to the jury, the court holds, by an instruction to the effect that before a recovery could be had it must be proved that the company was guilty of negligence in the maintenance of its track at the point of the injury; that the rails were exposed in such condition as to be dangerous to the traveling public, by the ordinary and usual method, in the ordinary and usual way; and that it was necessary for the jury to find that the accident and injury would not have occurred without the existence of the negligent acts complained of.

ALLEGATIONS REQUIRED IN APPEAL FROM REFUSAL TO APPROVE ROUTE—CONTROL OVER HIGHWAYS.

Appeal of Millbridge & Cherryfield Electric Railroad Co. (Me.), 51 Atl. Rep. 818. Jan. 6, 1902.

The supreme judicial court of Maine holds that, in an appeal, based upon the alleged neglect or refusal of municipal officers to approve the proposed route of an electric railroad company, under the provisions of chapter 268, sec. 6, Pub. Laws 1893, as amended by chapter 119, sec. 2, Pub. Laws 1899, relating to the organization of street railroad companies, it is necessary that enough should be alleged to show that the court has jurisdiction, and that the company had the right to apply to the municipal officers for an approval of its route. But it is not necessary to allege all the steps by which the company obtained that right. The statute gives that right to every "corporation organized" thereunder. Under the statute as it existed when the above company was organized, as preliminary to organization, it was necessary that the railroad commissioners should determine that public convenience required the construction of the railroad. But it is unnecessary to allege specifically, in an appeal of the kind stated, that the railroad commissioners had so determined, for it is necessarily implied in the expression "corporation organized," or in any expression meaning substantially the same.

The court holds, too, that chapter 119, section 2, of the Public Laws of 1899, relating to the route and location of street railroads in the ways and streets of a town, to the approval thereof by the municipal officers, and to appeals from their action or refusal to act, is not unconstitutional, as being beyond legislative authority, or as being arbitrary and unjust, or as permitting the property of towns to be taken for street railroad purposes without just compensation. The public has a mere easement in land taken and condemned for a highway or townway. It has the right to use it in certain ways. Within the scope of the easement, the public, which acts through the legislature, may regulate and control, may extend or diminish, the public uses, as it sees fit. The operation of a street railroad is an appropriate public use of a street. While a town is charged with the performance of many duties with respect to roads, and possesses a qualified control over them, it does not own them. When the legislature authorizes a new method of use of the public easement in a way, a town has no such property interest in the way as will entitle it to pecuniary compensation, nor has an injury been done to it of which it can properly complain.

DEFENSE UNDER NEW YORK LAW FOR EXACTION OF EXCESSIVE FARE FROM TRANSFER PASSENGER—REFUSAL TO RECEIVE TRANSFER TICKET FROM PASSENGER NOT NOTICED UNTIL BLOCKS BEYOND TRANSFER POINT—TENDER BACK BY CONDUCTOR OF EXCESSIVE FARE.

Tullis v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 75 N. Y. Supp. 863. Apr. 18, 1902.

Section 39 of the New York railroad law on "Penalty for Excessive Fare," provides that any railroad corporation which shall ask or receive more than the lawful rate of fare, unless such overcharge was made through inadvertence or mistake, not amounting to gross negligence, shall forfeit fifty dollars, to be recovered with the excess so received by the party paying the same. Section 105, entitled "Contracting Corporations to Carry for One Fare; Penalty," provides for transfers and a forfeiture of $50 for every refusal to comply with its requirements. The provisions of these sections in respect to excessive fares, the second appellate division of the supreme court of New York holds, are in pari materia, or of the same matter, and must be construed together. Thus viewed, where the exaction is in violation of both sections, the defense provided for in section 39 is available, and a railroad corporation, sued as was the company in this case for refusal to honor a transfer and the exaction of an additional fare, can relieve itself from liability for the penalty by showing, as provided for in section 39, that "such overcharge was made through inadvertence or mistake, not amounting to gross negligence."

Under the provisions of section 105 the court thinks it plain that a passenger desiring to make such a continuous trip as that which was contemplated by the party suing could not be deprived of his right to be carried for a single fare by giving him a transfer ticket which should be useless upon the first car which came along after he reached the point at which the transfer was to be made. But the fact that, in this case, the conductor, before the passenger left the car, offered to accept the transfer ticket held by the passenger, and to restore to him the five cents which he had paid, the court holds, warranted and required the inference that the overcharge was mistakenly made, and made under circumstances which did not constitute gross negligence. The omission of the conductor to notice the passenger with the ticket in his hand shortly after he entered the car, it says, might well be regarded as merely an inadvertence, and the conductor's refusal to receive it at first, when the passenger tendered it to him many blocks further on, was a natural mistake, in view of the conductor's supposition that the passenger had then only just boarded the car. If the passenger had accepted the proffered five cents and gone his way, he would have suffered no possible injury; and it would be a very harsh application of the law, and one not justified by the facts, to hold that the statutory penalty was recoverable in such a case.

LIABILITY FOR EJECTION AND SUBSEQUENT ARREST OF HOLDER OF DEFECTIVE JOINT-CONTRACT TRANSFER—RULES WHICH ARE NOT REASONABLE—GOOD FAITH OF CONDUCTOR NO DEFENSE—MEASURE OF DAMAGES.

Jacobs v. Third Avenue Railroad Co. (N. Y. Sup.), 75 N. Y. Supp. 679. Apr. 11, 1902.

The first appellate division of the supreme court of New York reverses in this case the judgment of the appellate term (XI Street Railway Review, 783; IV Street Railway Law, 76), which reversed a judgment of the general term of the city court of New York affirming a judgment for the party suing (XI Street Railway Review, 429; IV Street Railway Law, 31). The action was brought to recover damages for an alleged assault and false imprisonment, the party suing having been ejected by, and subsequently arrested at the instance of a conductor of the above company sued, who refused to receive a transfer ticket which by mistake had been punched as given at 5:15 p. m., whereas it was then 6:15 p. m., the passenger not understanding the meaning of the numbers and therefore not being aware that the mistake had been made. Between the railroads there existed, it appeared, a traffic agreement, based upon a valid consideration, whereby each railroad company agreed with the other to receive and transport passengers from the cars of the respective companies without further compensation than such as was paid to the company carrying the passenger to the intersection of the two railroads, and that the railroad carrying a passenger who desired a transfer should issue to such passenger a transfer ticket, which should entitle such passenger to carriage from the point of intersection to his destination upon the line of the railroad.

There can be no question, the court holds, but that, under the traffic agreement between these two railroads, each conductor acted as the agent of the respective railroads in issuing transfer tickets for carriage thereon. Each agreed to recognize transfer tickets issued by the other, and such agreement was admitted to be founded upon a valuable consideration. It was therefore clear that the party suing, when he received his ticket entitling him to ride upon the road of the company sued, entered into a contract of carriage with that company, and thereby became entitled to ride thereon to his point of destination. The mistake in punching the ticket was not his mistake. In law, it was the mistake of the company sued, as it was committed by its agent. The party suing could not be charged with contributory negligence in receiving the same, as he was in ignorance concerning whether it was punched right or wrong, and, in the absence of explanation, was unable to discover that a mistake had been made. Consequently, he was without means of determining it or ability to correct it. Under such circumstances, the company sued was not justified in refusing to honor the ticket. When, therefore, its conductor refused to accept the ticket for transportation of the party suing, ejected him from the car, and caused his arrest and imprisonment, the company was guilty of a wrongful act, and became liable in damages for such injury as he sustained. The refusal to receive the ticket, the ejection from the car, and the arrest and imprisonment were to be treated in law, as they were in fact, as continuous acts, for which the company sued was responsible.

With regard to the contention that the company was justified in making and enforcing reasonable rules and regulations respecting the recognition of transfer tickets, the court holds that there can be no such thing as a reasonable rule and regulation which protects the company against the mistakes of its own agents which result in the invasion of a passenger's rights. And it declares that the good faith of the conductor was of no consequence. It could not authorize or protect against unlawful acts.

Under the circumstances of this case, the court holds, the party suing was only entitled to recover compensatory damages. These embraced loss of time, the amount which he was obliged to pay for passage upon another car, and injury done to his feelings by reason of the indignities under which he wrongfully suffered.

CHALLENGE OF CONSOLIDATION OR LEASE BY STOCKHOLDER—DIRECTORS OF LESSOR COMPANY MADE THOSE OF LESSEE—POWER TO LEASE PROPERTY AND FRANCHISES—WHO TO EXERCISE POWER TO LEASE.

Dickinson v. Consolidated Traction Co. (U. S. C. C., N. J.), 114 Fed. Rep. 232. Feb. 13, 1902.

This suit was brought by the executors of an estate owning 100 shares of the capital stock of the above company to have a lease of its property and franchises set aside and its property restored to its stockholders. But consequences that would involve the destruction of the conditions of comfort and convenience to a large community, and the demoralization of settled plans for the administration of large and valuable properties, with possible serious resulting loss to the stockholders of the two companies, the United States circuit court, district of New Jersey, says, ought not to be lightly incurred. That a wrong and injury had been done by the transactions complained of, to the estate of the single decedent stockholder, whose executors were complainants in this case, or to the corporation of which he was a member, should be made clearly manifest before the asked for interference of the court should be granted. However, though it was true that no pecuniary loss or damage had been shown to have resulted to the holders of these 100 shares of stock, by reason of these transactions, the court must nevertheless consider whether a legal or technical wrong had been done them by reason of some contravention of their legal rights as stockholders, or to the corporation itself, by reason of the alleged illegal action or fraudulent mismanagement of its interests, by those who for the time being controlled it. And the court says that, although the stockholder as an individual can never go into a court of equity, and ask for relief against a third person, upon the ground that the corporation has made a bad bargain, whether by the fraudulent or the illegal action of its directorate, yet, if the corporation ought to bring a suit against such third person, and seek, as against him, to take back property, and if the corporation refuses so to do, the minority stockholder may, in equity, be permitted to assert the right which the corporation ought to assert, by alleging that the corporation so refuses to act, after he has made honest and bona fide efforts to induce them to do so, and by making his corporation a party by bringing it in as a defendant, though its real status is that of plaintiff, and seek to obtain for it the relief to which it would have been entitled, had it itself sued.

That the lessee company was controlled by many or most of the same men who, before the lease, controlled the lessor company, the court says, would seem to be to the advantage of the stockholders of that company, and not to their detriment. This state of things as disclosed by the record, was very far from sustaining the allegations of fraud against the individual defendants, directors in the two companies, or any of them, and nothing but the clearest proof of such fraud would justify the interference asked of the court on that ground. The power of the two corporations, the one to be lessor, and the other the lessee, of the property, rights, franchises and privileges which the lessor company had acquired by the legislative authority that granted it corporate existence, the court says, was not to be implied from any general power connected with the subject of their creation. As the power to negotiate and execute the lease had been challenged, those who would sustain it, must point to some express authority of the legislature of the state by which these corporations were created. But the court considers that there was the requisite authority where both companies were organized under a statute which provided that any company created thereunder might lease the property and franchise of any other corporation owning or operating any street railway, etc., and that "such other corporation and corporations are hereby authorized to make such lease." Every stockholder, in subscribing for his stock, took it subject to the conditions of the act, under the authority of which it was issued, and of the relevant provisions of law existing at the time, and was bound by their several requirements and conditions. The power to lease having been so given, without prescribing any mode in which it was to be exercised, it must be classed with the general powers conferred by a charter, which are to be exercised by the majority of corporators or stockholders.

LIABILITY OF CONSOLIDATED FOR DEBTS OF OLD COMPANY—ILLEGALITY OF CONSOLIDATION NO DEFENSE.

Shadford v. Detroit, Ypsilanti & Ann Arbor Railway (Mich.), 89 N. W. Rep. 960. Apr. 8, 1902.

If there is in fact a consolidation between certain street railway companies, the consolidated company, the supreme court of Michigan holds, cannot deny its liabilities, either for contracts or torts, or its liability resulting from such consolidation, upon the plea that its organization is illegal, as, for example, because the street railway act under which it is organized does not authorize a consolidation. The legality of its organization cannot be attacked collaterally in suits by and against it, based upon dealings with it. Its legality can be attacked only in a direct proceeding by the state for that purpose. So long as the state chooses to recognize its validity by keeping silence, it is a corporation de facto, or in fact, though not de jure, or of right, and liable the same as any other corporation in its dealings with others. Nor can the consolidated company say that one of the old companies was insolvent, and that therefore a creditor of such old company was not prejudiced by the consolidation or transfer. By the consolidation the new company is burdened with the debts of the old, and the sole question then is, has the new company sufficient assets to pay its debts which then include those of the old companies? The law will not permit the creditors of two corporations to be deprived of the assets of such corporations in payment of their debts, and turn them over to suits in equity against the stockholders, when the union or consolidation with another company is effected without the passage of a dollar or other valuable consideration passing between the corporations themselves.

DILIGENCE REQUIRED IN EQUIPPING CARS WITH FENDERS WHEN KIND MUST BE APPROVED BY COMMON COUNCIL.

Platt v. Albany Railway (N. Y.), 62 N. E. Rep. 1071. Feb. 25, 1902.

October 7, 1895, a city ordinance was passed requiring electric cars to be provided with fenders, but that no fender should be used until approved by the common council. November 25, 1896, the company presented a communication to the common council stating that, after various tests, it had selected a fender manufactured in Rhode Island as the most suitable to prevent accidents, and asking that its use be approved. This communication was referred to the committee on railroads, which made no report upon the subject until May 17, 1897, when it recommended the use of the fender selected by the company. The report was adopted at once, and on the day after its adoption the company ordered the fender, but the first lot was not received until June 16, 1897. In the meantime, on May 29, 1897, a boy was killed; and this action was subsequently brought to recover damages therefor.

Upon request, the trial court instructed the jury that the absence of a fender from the car was not per se or in and of itself negligence. But it refused to charge, as further requested, that the company was not bound to have a fender on the car at the time of the accident. The court of appeals of New York holds that this last was error. It says that the company had a reasonable time, as was properly charged, to obey the command of the local legislature, and it used that time with diligence. It was under no obligation to order fenders in advance of the approval of the common council, for that might have involved useless expense, as there were several kinds in use. All that was required was prompt action as soon as it knew what fender to order, and prompt action was conclusively proved. As the jury had received no instruction whatever upon the subject, the company was entitled to the instruction prayed for. It did not ask to have the question of liability for failing to use fenders wholly withdrawn from the jury, and it was apparently willing that its alleged want of diligence in selecting a fender should be considered by them. Its request simply involved the proposition that it was not bound, as matter of law, to have a fender on its car at the time of the accident; thus impliedly conceding that its diligence or want of diligence in making a selection should be left to the jury, as a question of fact. It was, at the least, entitled to this, and a failure to charge, either literally or in substance, as requested, was reversible error.

Moreover, the trial court not only omitted to comply with the request stated, but went further, and charged that the jury might find whether the company had used reasonable diligence in equipping its cars with fenders after the fender selected had been approved by the common council, although during the short interval that elapsed between the approval and the accident the railroad company had done everything which, so far as appeared, it could have done to procure fenders. This, also, the court of appeals holds reversible error, for it cast a burden upon the company which the law did not require it to bear. The law required rasonabl diligence, but the charge, so far as the evidence permitted the court to see it, required an impossibility.

INJURY TO PASSENGER BY SUDDEN STOPPING OF CAR BY AND TO AVOID COLLISION—CULPABILITY ESSENTIAL TO LIABILITY.

Cleveland City Railway Co. v. Osborn (Ohio), 63 N. E. Rep. 604. Feb. 25, 1902.

Where a passenger on a street railway car was thrown from the car and injured by the sudden stopping of the car in an effort to avoid a collision, and by the shock of a collision which was not brought about by the negligence of the company, the supreme court of Ohio holds that it was damnum absque injuria, a loss without a wrong, or that kind of damage for which an action will not lie. It says that in an action to recover for personal injury occasioned by negligence of the defendant, the plaintiff cannot recover by merely proving an act of the defendant which was the proximate cause of the injury; but, to authorize a recovery, the plaintiff must also show that such act resulted from culpable negligence by the defendant.

DUTY TO REGULATE SPEED APPROACHING CROSSINGS.

West Chicago Street Railroad Co. v. Petters (Ill.), 63 N. E. Rep. 662. Apr. 16, 1902.

It was the duty of the company and its servants, in approaching crossings, the supreme court of Illinois holds, to so regulate the speed of its cars that collisions with other persons having the right to cross such streets could, by the exercise of ordinary care, be avoided.

FRANCHISE CONDITIONS ENFORCEABLE BY MANDAMUS AGAINST PURCHASING COMPANY.

Township of Grosse Pointe v. Detroit & Lake St. Clair Railway (Mich.), 90 N. W. Rep. 42. Apr. 22, 1902.

In this case a peremptory writ of mandamus was issued by the circuit court, on petition of the township, requiring the Detroit, Lake Shore & Mt. Clemens Railway and the Detroit & Lake St. Clair Railway to comply with certain conditions of a franchise granted by the township to the first company, its successors and assigns, and accepted by such company, which afterwards sold its railroad, franchise rights, and other property to the second company. The writ commanded both companies to maintain certain electric lights during the hours of darkness, while actually engaged in running cars, and to run a car over said line daily, except Sundays, at such an hour that passengers thereon might make convenient connection at the terminus of said railway in Grosse Pointe Farms, with a car on the Citizens' line, reaching Woodward avenue, in Detroit, at 7 o'clock a. m., local time. The purchasing company contended that the writ of mandamus should not have issued against it—First, upon the ground that the franchise or license of a town board was a mere contract, and did not rise to the dignity of a statute, and therefore that the duty to perform the acts required by the writ was not a duty imposed by law, but a mere contractual obligation; and, second, upon the ground that it was not shown to have accepted the conditions of the franchise. With neither contention, however, does the supreme court of Michigan agree. It says that authority to occupy the highway was derived from the statute. The only limitation was that the consent of the local authorities be first obtained, and when that was obtained, the conditions were as binding as though imposed in the statute. As to the contention that the purchasing company was not liable to be proceeded against in the same manner as its grantor was, the court thinks it, unsound. It says that the only rights derived were by purchase, it was true, but it seems clear that such a purchasing company takes the road subject to all the obligations resting upon its grantor. Hence, the court holds that the writ of mandamus was properly directed to the purchasing company. But the other company having sold out to it, and not being in position to comply with the requirements of the writ, the order as to it was reversed.

BACKING DELIVERY WAGON UP TO CURB WITH TEAM ON TRACK—DUTY OF EMPLOYES TO NOTICE CONDITIONS PREVAILING ALONG TRACK —DUTY OF MOTORMAN APPROACHING WAGON.

Fenner v. Wilkesbarre & Wyoming Valley Traction Co. (Pa.), 51 Atl. Rep. 1034. May 12, 1902.

When a delivery wagon which was so constructed that the front wheels would not turn under the bed was backed up and stood against the curb, which was 12 feet 8 inches from the street railway track, at a place where a delivery was to be made, the horses were necessarily standing on the track. This was the position in which the driver was required to place his team to make the delivery. The supreme court of Pennsylvania says that it was upon the public highway, where the driver had the right to be, and where, in the performance of his duty, he was required to be. It was not a place of known danger, and the presence of the railway tracks upon the street did not make it so. The right of the company to use the track was superior to his right to occupy it, but this well-established rule did not prohibit him from using it temporarily for a legal purpose, nor authorize the company's employes in charge of the car to endanger his life, when, by the observance of their duty, it could have been avoided. The place of the accident was in the public street, where both parties had a right to be, and where each, therefore, was bound to be on the lookout for the other. The position of the driver of the wagon became perilous not by reason of an illegal act in placing his team on the street car track, but by the subsequent recklessness and negligent conduct of the conductor and motorman on the car, which he could not, and was not required to anticipate. It was not in evidence that he saw an approaching car when he placed his wagon against the curb, nor that he had reason to apprehend the presence of one before he could deliver his goods and depart. The inference from the facts disclosed by the testimony was directly to the contrary. Whether he used ordinary and reasonable care under the circumstances disclosed by the evidence was a question for the jury.

Again, the court says that the street was narrow, and the community was thickly populated. Certain obstructions in front of the property where the delivery was to be made which necessitated the backing in of the wgon to unload it on the premises had been there for five or six months prior to the accident, and the company's employes in charge of the car knew this fact. It was their duty to take notice of the conditions prevailing along the track at the time of the accident, and which, according to their own testimony, they knew, and to run their car at a rate of speed which would not endanger the safety of those who might lawfully be on the track. A failure to observe these precautions was negligence. The undisputed fact here was that the motorman had a clear, unobstructed view of the team for a distance of more than 200 yards, and therefore his duty required him not only to run his car at a reasonably safe speed, but also to give warning of its approach to the wagon, regardless of the fact that it was on the track, not at a crossing. It was a place of danger,—where a collision might occur,—and hence it was his duty to take the necessary precautions to avoid an accident.

CONSTRUCTION AND OPERATION OF ROAD UNDER AUTHORIZED ORDINANCE WILL NOT PREVENT GRANT TO ANOTHER COMPANY—"EXTENSION" DEFINED—CONSTRUCTION OF INDEPENDENT RAILWAY AS EXTENSION.

Pennsylvania Railroad Co. v. Inhabitants of Hamilton Township and Mercer County Traction Co. (N. J. Sup.), 51 Atl. Rep. 926. Feb. 24, 1902.

A street railway company, the supreme court of New Jersey holds, obtains no such rights in a public road or street by the construction and operation of a railway therein under an ordinance passed ultra vires or beyond the lawful capacity or powers, say of a township, as will prevent the township committee from granting permission to another railway company to construct and operate its railways in the same public roads or streets. An "extension" of a railway, as the word signifies, it says, is a prolongation of it from one of its termini to some other designated point. And it holds that a grant of permission to construct as an extension what is rather an independent railway is beyond the powers of a township committee, and altogether nugatory, and that the mere construction, maintenance, and operation of such an extension can give no rights to the company.

MUST PROTECT PASSENGERS AGAINST INJURY FROM WILLFUL MISCONDUCT OF EMPLOYES.

Johnson v. Detroit, Ypsilanti & Ann Arbor Railway (Mich.), 90 N. W. Rep. 274. May 8, 1902.

A passenger who paid his fare to a certain place and received a check or ticket in receipt for it was informed, after a change of conductors, that the ticket was not good, and, on his refusing to pay his fare, was ejected from the car. He again boarded the car, paid his fare again, and, it was testified, demanded the return of the ticket, which was refused. A few minutes later, he went to the rear platform, where the conductor was, and again demanded the return of the ticket. In an altercation which ensued the conductor struck him and inflicted the injuries sued for. The principal contention of the company was that it was not liable for this act of the conductor, because not within the scope of his authority. The supreme court of Michigan, however, affirms a judgment in the passenger's favor. It says that it thinks the rule relieving the master from liability for a malicious injury inflicted by his servant when not acting within the scope of his employment does not apply between a common carrier of passengers and a passenger, and that it is the duty of the carrier to protect its passengers against injury from the willful misconduct of its servants while performing the contract to carry.

EJECTION OF PASSENGER HOLDING WRONG COUPONS THROUGH MISTAKE OF PRIOR CONDUCTOR—MEASURE OF DAMAGES.

Brown v. Rapid Railway Co. (Mich.), 90 N. W. Rep. 290. May 8, 1902.

A round-trip ticket consisted of eight coupons. Four of these coupons, colored respectively white, pink, yellow, and blue, were the "going portions of the ticket," and four coupons, colored respectively blue, yellow, pink, and white were for the return in inverse order. Each coupon contained the names of the stations between which it was good, and the words, "Detroit to Marine City, and Return," and "Void if Detached from Signature Coupon." The third conductor on the going trip discovered, and notified the passenger, that the previous conductors had made a mistake, and had taken coupons from the wrong end of the ticket; tore off and handed him the first two going coupons, and himself took the third one. The passenger asked if he could use the detached portions, and was told that they would be accepted by succeeding conductors. On the return trip, however, the conductor in charge of the car refused to honor these coupons, notwithstanding the passenger's explanation and offer to corroborate his statement by other passengers, and, on his refusal to pay another fare, expelled him from the car, after which he took the next car an hour later and paid his fare, on the conductor's refusal to accept the coupons after learning of the other conductor's action. Testimony was offered to show that the passenger had been sick, and suffered a relapse, being confined to his bed four or five weeks thereafter. In justice court he recovered a judgment for $500, and the company appealed to the circuit court, where a verdict was directed in its favor. But the judgment of the latter court is reversed by the supreme court of Michigan, and a new trial ordered, though without costs to either party.

The supreme court says, in further explanation, that the most serious inconvenience that the passenger need have suffered was to pay 40 cents for his return fare, present his tickets, with proof of the circumstances, and get his money refunded. He was not content to do this. Rather than lose 40 cents, or be to the trouble of asking that it be refunded, he preferred to refuse to recognize the reasonable rule of the company. He refused to leave the car, notwithstanding the suggestion of the conductor that he pay his fare, and have it refunded later, and allowed the conductor to drag him through the car, and actually made him lift him off. The supreme court says that it has several cases which hold that under such circumstances as these the conductor does not commit a wrong by ejecting from his train one who has no ticket, and refuses to pay, and that it would be absurd to hold that the conductor must take his passenger's word regarding his failure to have an appropriate ticket, or take the evidence of fellow passengers, and determine the matter at his peril, or that of the company. These two coupons which the passenger had were the first that should have been detached. Had he succeeded in riding over the first two sections without detection by the conductor, and detached them himself, he could have made the same claim, or sold them to another for second use. The law permits these companies to make reasonable rules for their protection, and this passenger had no cause of action arising out of his ejection from the car, as the circuit judge properly held. But, under the proofs, he paid 40 cents by reason of the inadvertence of the conductor, and, under his declaration, which alleged the contract and its breach, as well as the expulsion in aggravation of it, he had a right to recover that amount, though he had no right to expect a verdict of $500.

ABUTTER MAY ENJOIN UNAUTHORIZED LAYING OF TRACK—RIGHT TO QUESTION POWER—CONSTRUCTION OF DELEGATIONS OF POWER—INDIVIDUALS NOT ENTITLED TO CONSTRUCT STREET RAILWAYS—WHAT STATUTE MEANS BY STREET RAILWAY.

Allen v. Clausen (Wis.), 90 N. W. Rep. 181. Apr. 22, 1902.

An abutting lot owner, the supreme court of Wisconsin holds, must submit without remedy or compensation to the injury caused by the construction of a street railway, when the acts are done within the street by authority of law, but may enjoin the laying of a railway track which is about to be laid without authority of law on the street in front of his premises.

A number of cases, the court says, have established the law in Wisconsin that the vacating of a franchise granted by the state can be accomplished only by proceeding in the nature of quo warranto in the name of the state, and that it is not within the province of a court of equity, at the suit of a private plaintiff, to question the regularity of the proceedings by which a municipality has, under duly delegated authority, granted a franchise on behalf of the state, of which the grantee is in de facto or actual exercise and enjoyment. It has, however, never been held that, where one attempts to justify acts by a pretended license or franchise which the grantor had no power whatever to confer, a court, whether of law or equity, cannot discover that fact and deny the claim of justification. It matters not whether such defect of power rests upon the state itself or upon any of its subordinate agencies attempting its exercise. The readiness of courts so to do has been evinced in many cases in this state and elsewhere.

As a corollary of the doctrine that the highways of the state are under the control of the general state government, and that the right to use the same for street railways, etc., is by franchise emanating from the state, the court says that it results that the municipal corporations have power to make such grants only by delegation from the state. It is a general proposition that a municipal corporation possesses and can exercise only powers granted by express words, or those necessarily implied in or incident thereto, or those essential to the declared purposes; not merely convenient, but indispensable. Any ambiguity or doubt as to existence of a power is to be resolved against the corporation, and the power denied. Another cardinal rule of construction is that the grant of a power under specified circumstances, or accompanied by defined conditions or limitations, excludes that power otherwise. The maxim, "Expressio unius, exclusio alterius," that is, "the expression of one thing is the exclusion of another," is especially controlling upon such legislation. The application of such rules of construction to section 1862 of the Revised Statutes of Wisconsin of 1898 must, of course, result in denial of power in any city to grant franchise to use streets for a street railway, except to a corporation organized for the purpose of operating such establishment under the Wisconsin statutes, or to persons "who have a right to construct, maintain, and operate a street railway," the section providing that any municipal corporation or county may grant to any such corporation, or to any such person, the use of any streets or bridges within its limits. The last class obviously does not contemplate persons who have merely the common right to do business, for to that end the quoted words would be meaningless. The legislature must have intended to limit such franchises to persons distinguished from the great mass of mankind by the qualifying description. The descriptive words used with reference to the permitted grantees are well adapted to segregate those who have already had franchises from the rest of mankind. Those who have not received such franchise cannot, in any fair sense, be said to have the "right to construct, maintain, and operate a street railway." Men generally may have the natural right to build and use a railway on their own land or on that of others by their license; but a street railway, as mentioned in the statutes, means one laid in a street, and no man has a right to either construct or operate a railway there without permission so to do from the state. That an authorization to grant such franchises only to corporations excludes any power to confer one on individuals, and renders void any attempt so to do, has been often decided by other courts. The reasons for such holdings are obvious. The legislature having created corporations for the public purpose of operating street railways, having hedged them about with a code of statutory regulations for the safety and convenience of the public, and having the reserved right to change and control them, even to destroy them, may well adopt a policy of conferring extraordinary rights in its highways only upon the corporate bodies so within its control.

The court cannot doubt that such legislative policy and purpose is apparent in the Wisconsin statutes, and that from the municipal corporations has been withheld any power to grant to individuals, except of a specified class, franchises to construct or operate street railways in or over the public streets.

PREMATURELY STARTING CAR.

Kellegher v. Forty-Second Street, Manhattanville & St. Nicholas Avenue Railroad Co. (N. Y.), 63 N. E. Rep. 1096. May 27, 1902.

It is doubtless true, the court of appeals of New York says, that it is the duty of carriers of passengers to allow persons entering their car a reasonable time within which to enter, and, if it is prematurely started with such unusual or unnecessary violence as to do the passenger injury while entering, a jury may be justified in finding the defendant guilty of negligence.

PROPERTY ADDED TO PLANT PASSES UNDER PRIOR MORTGAGE.

Westinghouse Electric Manufacturing Co. v. Citizens' Street Railway Co. (Ky.), 68 S. W. Rep. 463. May 27, 1902. "Not to be officially reported."

The law is well settled, the court of appeals of Kentucky says, that property added to the plant of a street railroad, and which becomes an essential and integral part of its road, passes under a mortgage previously executed and recorded covering its entire property and road constructed and to be constructed, although furnished under a contract by which the title was to remain in the seller until payment made.

INJURY TO WOMAN ATTEMPTING TO ALIGHT FROM CAR IN MOTION—INCREASE OF SPEED.

Blakney v. Seattle Electric Co. (Wash.), 68 Pac. Rep. 1037. May 13, 1902.

It need not, of course, be argued, the supreme court of Washington says, that a woman of mature years and discretion cannot recover from a street car company for injuries received by her while attempting of her own volition to alight from one of its cars while the same is in motion; nor need it be argued that it is not negligence per se (or in and of itself) to increase the speed of a car, nor that it is not negligence to do so when a passenger is in the act of alighting therefrom unless the car company knows, or could, by the exercise of reasonable diligence, have known, of that circumstance.

SILENCE DOES NOT RENDER COMPANY LIABLE FOR PAVING BETWEEN TRACKS.

City of Williamsport v. Williamsport Passenger Railway Co. (Pa.), 52 Atl. Rep. 51. May 19, 1902.

Where under its charter a street railway company is not liable for paving or repaving streets occupied by its tracks, or any portion of them, but only for keeping the streets in repair, it is not liable for the cost of paving between its tracks because it had knowledge that a paving company was proceeding to do the paving, and it did not in any way repudiate the alleged implied contract, the supreme court of Pennsylvania holds, when the paving was done by the paving company under a contract made with the city to pave the entire street, but to look to the street railway company only for paving between its tracks.

CONDEMNATION AS AGAINST ABUTTER IN NEW YORK.

Adee v. Nassau Electric Railroad Co. (N. Y. Sup.), 76 N. Y. 589. May 29, 1902.

The second appellate division of the supreme court of New York holds that, under the law of that state, where the establishing and running of a street-surface electric railroad in the public streets of a city is an additional burden on the land of the adjoining proprietor, for which compensation must be made, a street surface railroad has power to acquire by condemnation the easement to construct and operate a surface railroad over a public street, as against an owner of abutting land, who also owns the fee of one-half the street in front of his land, and this notwithstanding the declaration in section 90 of article 4 of the railroad law that "nothing in this section shall be deemed to authorize a street railroad corporation to acquire real property within a city by condemnation."

CONSTITUTIONAL FRANCHISE LEGISLATION.

Smith v. Indianapolis Street Railway Co. (Ind.), 63 N. E. Rep. 849. Apr. 30, 1902.

The supreme court of Indiana holds constitutional the act of 1899 providing, in substance, that it "may be lawful" for any city having a population in excess of 100,000 persons by the last federal census preceding the incorporation of "any street railroad company, now or hereafter organized," to enter into a contract with said company for the granting to said company of a franchise for a term not exceeding 34 years, subject to many conditions, relative to compensation, fares, paving, the use of its lines by suburban and interurban railroad companies, the right of control of the city, etc. It especially does not think that the act violates the constitutional provision that "the general assembly shall not grant to any citizen, or class of citizens, privileges and immunities which, upon the same terms, shall not belong to all citizens."

ATTEMPTING TO DRIVE ACROSS TRACK WITH CAR 75 FEET AWAY—DUTY OF MOTORMAN AT CROSSING, ESPECIALLY WITH VIEW OBSTRUCTED BY ANOTHER CAR.

Schoener v. Metropolitan Street Railway Co. (N. Y. Sup.), 76 N. Y. Supp. 157. May 9, 1902.

It certainly was not an act of negligence on his part, the first appellate division of the supreme court of New York holds, for the driver of a horse attached to a delivery wagon to attempt to cross the street, at a street crossing where he had as much right to the use of the street as the street railway company did, if the latter's car was then 75 feet away, and the jury would have a right to find, if the car were this distance away, that the company was negligent if it did not check the speed of its car and prevent a collision. A duty rested upon the motorman to have the car under control as it approached the crossing, and this duty was increased, if it was true, as contended by the company, that his view of the crossing was obstructed by the car of another company on a parallel track, for which reason he should have exercised more care. He could not approach the crossing at a high rate of speed, and then, when a collision occurred, excuse himself because there was another car in front, which prevented his seeing the crossing.

DILIGENCE REQUIRED TO PROTECT TRAVELERS FROM TROLLEY WIRE—NOTICE TO MOTORMAN AND CONDUCTOR.

Read v. City & Suburban Railway Co. (Ga.), 41 S. E. Rep. 629. Apr. 28, 1902.

When a street railway company with reasonable promptness discovers the sagging of one of its trolley wires, which has been unexpectedly caused by the falling of a wire belonging to another, and immediately takes proper steps to prevent its wire from causing injury to travelers in the street over which the same is suspended, the company, the supreme court of Georgia holds, meets the legal requirements as to diligence under such circumstances.

Notice to the servant of a corporation with respect to a matter over which he has no authority, and as to which he has no duty to perform, the court holds, is not notice to the corporation. So, in this case, if it was not within the scope of the duties of a motorman and conductor to immediately take steps to guard the public from the danger created by the sagging of the company's trolley wire, it would not be proper, in determining whether, after the company became informed of the emergency to be met, it acted with reasonable diligence in taking proper steps to protect travelers passing along the street, to regard notice to the motorman and conductor as notice to the company itself, and thus place upon it the unreasonable requirement of taking action in the premises before any of its officers or agents who were authorized to act in its behalf had received information of the necessity to do so.

INJURY TO PASSENGER BY RECEIVING ELECTRIC SHOCK FROM HANDHOLDS WHILE ATTEMPTING TO BOARD CAR AND BEING DRAGGED ALONG BY ITS STARTING—CARE REQUIRED OF COMPANY.

Dallas Consolidated Electric Street Railway Co. v. Broadhurst (Tex. Civ. App.), 68 S. W. Rep. 315. March 29, 1902. Rehearing denied May 3, 1902.

The evidence showed that the party suing in attempting to board a car took hold of the handholds designed to aid passengers in getting on board the cars. He put one foot on the step of the car, and was in the act of getting aboard, when he received an electric shock which fixed his grasp upon the handhold of the car, and while in this attitude the motorman started the car in motion, and he was dragged some distance, when his hand relaxed his hold, and he fell in the street. The electric shock and the violence suffered by having been dragged along by the car inflicted serious injuries upon him. In affirming a judgment in his favor, the court of civil appeals of Texas states that it is of the opinion that the circumstances surrounding the injury were sufficient to raise a presumption of negligence on the part of the company. It says that the handholds and steps of the car were designed to be used by passengers as aids in their entrance to or exit from the cars; the cars and their equipment were under the control and management of the company; and the accident was such as, in the ordinary course of things, would not happen with the use of proper care by those who have their management. Moreover, it is of the opinion that a higher degree of care than is required by law was not imposed upon the carrier by a charge in which the jury were told that the company "owed to its passengers the duty of exercising great care and caution to keep the machinery and appliances of its cars in reasonably safe condition and repair, and to exercise like caution in the operation of its cars."

INJURY FROM ELECTRIC SHOCK TO PEDESTRIAN STEPPING ON RAIL—PRESUMPTION OF NEGLIGENCE—EVIDENCE OF EMPLOYE.

Braham v. Nassau Electric Railroad Co. (N. Y. Sup.), 76 N. Y. Supp. 578. May 29, 1902.

While crossing the street one afternoon the plaintiff stepped on one of the company's rails and received an electric shock. A judgment in his favor for damages for the resulting injuries is affirmed by the second appellate division of the supreme court of New York. It says that the company claimed that the complaint should have been dismissed—First, because no negligence on its part was established; and, second, because, if a prima facie case of negligence was established in the first instance, the circumstances were conclusively rebutted by the proof that no defect existed at the place of the accident which would permit the escape of the electric current. These claims were untenable. It was clearly established that the shock which the party received would have been impossible if the company's track was in good order. It was further proven that close to the place where he was walking was a joint where two rails met, which, if not properly bonded or welded, would permit the infliction of an electric shock upon any one whose foot should be placed upon it; and there was some evidence that the rails at the time were so laid as not to allow in the usual manner for expansion and contraction, and that such manner of laying the rails was calculated to result in imperfect joints. This evidence, together with that of the shock actually received by the party, established the company's liability, and called upon it for an explanation of the occurrence, in order to relieve it from the charge of negligence, on the principle of res ipsa loquitur, or the matter speaks for itself. The presumption of negligence arising from the proof referred to was not so far overborne by the company's evidence as to make the question one of law. The explanatory evidence was principally that of an employe of the company whose duty it was to keep the tracks in order, and who testified that they were in order at the time and place of the accident. Waiving the question whether this evidence could be regarded as explaining the occurrence, it was clear that, in view of the position and employment of the witness, a submission of the charge of negligence to the jury for determination was required. The happening of the accident under the circumstances tended to prove the existence of conditions necessary to cause it which could not arise without either negligence on the company's part, or a defect of some kind, for which, if such a thing be possible, it was not to blame; and proof merely that no defect whatever existed would not serve to remove the case from the province of the jury, where the proof was furnished by an interested witness in the company's employment, and question of credibility was accordingly a factor.

UNCONSTITUTIONALITY OF STATUTE REQUIRING POLICEMEN AND FIREMEN TO BE CARRIED FREE.

Wilson v. United Traction Co. (N. Y. Sup.), 76 N. Y. Supp. 203. May 7, 1902.

The third appellate division of the supreme court of New York holds unconstitutional and inoperative as against the company chapter 417 of the New York laws of 1895 providing that the mayor of each city of the state and the president of each incorporated village of the state may issue to each policeman and fireman a certificate of the appointment and qualification of such policeman or fireman as such, and it shall thereupon be the duty of every street surface and elevated railroad company carrying on business within such city or village to transport such policeman or fireman free of charge while he is traveling in the course of the performance of the duties of his office. It says that the decision in the Beardsley Case, 162 N. Y. 230, which follows the decision of the federal court in Railroad Co. v. Smith, 173 U. S. 684, seems to be a clear authority for the proposition that the above statute operates to deprive the company of its property without due process of law. In those cases the companies were required to issue mileage books, at a reduced rate of fare, to those willing to purchase a designated number of miles at one time. In this case the company is required to carry a certain specified class of persons entirely free of charge. If the former is an invasion of the companies' property rights, the latter is equally so; and in neither case is there any process of law provided for, save the mandate contained in the act itself.

Nor does the court consider that the statute can be sustained as a valid exercise of the police power of the state. It says that its evident purpose and effect is to relieve the municipalities referred to therein from a portion of the burden of maintaining their police and fire departments at the expense of the several street railway companies within their limits. Concede that the public safety requires that the public officers mentioned be carried upon such railroads, it is not apparent why, in order to promote that safety, they should be carried free of charge. There is no pretence that the act is necessary to secure their right to ride upon such roads. The sole purpose is to secure their right to ride free. Thus the only advantage secured by the act to the public is that the railroad company, instead of the municipality, pays the fare. Such an advantage may be a public convenience; but the right to take the property of the individual citizen, or of a class, for the sole reason that the proceeds of it would be convenient to aid the municipality in defraying its general expenses, has not yet been conceded as a legitimate exercise of the police power, and this court is not disposed to concede it now.

REQUIREMENTS FOR ENFORCEMENT IN COURT OF EQUITY OF CONTRACT WITH CITY—VALIDITY OF GRANT OF EXCLUSIVE RIGHT TO DECIDE AS TO OCCUPATION OF STREETS—REQUISITES OF ELECTION TO OCCUPY STREETS.

Logansport Railway Co. v. City of Logansport (U. S. C. C., Ind.) 114 Federal Reporter, 688. Mar. 8, 1902.

Before a street railway company can, in a court of equity, complain of the violation by a city of its contract rights, it must show, the United States circuit court district of Indiana, holds, that it has a contract, and that such contract is free from fraud and enforceable at law, and one that is fair and reasonable in all its parts, and within the power of the city lawfully to enter into. If the contract is unfair, unreasonable, or against good conscience, a court of equity would be justified in refusing to enforce it, and would leave the party to its remedy at law. The court, too, must enforce the contract, if it enforces it at all, just as it is written; and it has no power, by changing or varying material terms, to make, in effect, a new contract for the parties.

Under ordinances granting the exclusive right to use in perpetuity certain streets, designated by name, and also the right to use and occupy such other streets and bridges in the city as the street railway company, its successors and assigns, might from time to time elect to use and occupy, the court holds that the right granted, except as to the designated streets, was a mere offer, which could only became contractual obligation by the election of the company to use and occupy the streets for railway purposes. Such election must be made in good faith, and evidenced by some open and notorious act brought to the notice of the common council. Until the offer was accepted by such an election, it could be withdrawn.

Moreover, the court holds that it was ultra vires, or beyond the legal power of the common council to surrender its control of the streets of the city in perpetuity to the company. The municipal authorities had no power to grant forever to the company the right, at its own uncontrolled election, to use and occupy such or all of the streets of the city as it might from time to time elect. The right to determine for itself from time to time what streets could be used and occupied for street railway purposes consistently with the public safety and welfare is a power incapable of absolute alienation by the common council. By the ordinances in question, if valid, to the company's election was relegated the question whether or not a street could, with due regard to the comfort and safety of the people, be occupied by a single or a double-track railway. Such a surrender of corporate power in perpetuity to a street railway company cannot and ought not to be upheld. It cannot be supported as a reasonable exercise of the power of a trustee over a trust estate committed to its charge, to be administered in the interest of the public, and for the private advantage and gain of railway or other corporations.

LIABILITY FOR INJURY TO PASSENGER KNOCKED OFF PLATFORM OF CROWDED CAR AND TRAMPLED ON BY PASSENGERS FRIGHTENED BY FLASH—DUTY OF COMPANY—CARE REQUIRED OF PASSENGER—PROOF OF DEFECT IN CAR OR APPLIANCES CONNECTED THEREWITH.

Davis v. Paducah Railway & Light Co. (Ky.), 68 S. W. Rep. 140. May 7, 1902.

On account of its crowded condition the party suing was on the front end of a motor car, and, according to the proof for her, when the motorman applied the full power the car began to slow up, and there was a flash of light. The motorman called loudly to have the trolley thrown off, and for nobody to get off the car; that there was no danger. The passengers in the car cried, "Fire!" and began to rush out pellmell. The party suing was holding on to the car, but the heat which flashed up burned her hand so that she had to let go, and when she did this the crowd surging by knocked or pushed her off the car and trampled upon her, inflicting very serious injuries.

In reversing a judgment rendered in favor of the company, the court of appeal of Kentucky holds that a company's duty to its passengers is not fulfilled by recent inspection, or by an inspection by a competent employe. The rule, it says, is thus well stated in 2 Shear. & R. Neg. Sec. 495 "Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a common carrier of passengers for hire, in the performance of his duties as such, the utmost care and skill which prudent men are accustomed to use under similar circumstances." This rule was followed in Railway Co. v. Weams, 80 Ky. 420, where the court added: "The degree of care and skill increases with the hazards of the mode of conveyance employed by the carrier."

The court next pronounces objectionable an instruction that it became the legal duty of the party suing when going upon the car, to exercise due care and caution, use her eyes, and act with reasonable care and judgment for her own safety, more especially if she found the car unusually overcrowded with pasengers. In lieu of this, it says, the jury should have been told that it was incumben on the party suing while on the car to exercise such care and caution as might be reasonably expected of a person of ordinary prudence situated as she was.

A still more objectionable instruction, the court holds, was one by which the jury were told that the party suing could not recover for the insjuries received by the passengers running over her after she was pushed off the car by them and fell to the ground. If the company's negligence caused the panic among the passengers, and their conduct was the natural result of its negligence, or was such as might reasonably be expected under the circumstances, considering the crowded condition of the car, and the fact that it was propelled by electricity, the company was answerable; although it would not be responsible if the panic among the passengers which caused the injury to the party suing was needless, and there was no apparent danger that might reasonably be expected to cause a panic among the passengers. If the company was negligent, and this negligence produced a flash of fire, followed by smoke in the car, and this caused the stampede of the passengers, and made them run over the party suing, it could not be held as a matter of law that her injury was not the proximate and natural result of the company's negligence.

Furthermore, the court holds that the rule is settled that, where the passenger shows a break in the railroad track, or the breaking of an axle or wheel of a car, he makes out a prima facie case in a suit to recover for an injury received by reason of such defect. This rule applies to all those things which the carrier is bound to supply, and are defective, by reason of which an injury to the passenger occurs. But this court has in a number of cases said that it is better not to instruct the jury as to burden of proof, and it is safest to so frame the instruction as to indicate the burden of proof wihout expressly referring to it. Under this rule the court should have instructed the jury that, if the injury of the party suing was due to any defect in the car or cars on which she was riding, or the machinery or appliances connected therewith, and she did not, by her own want of ordinary care, contribute to the injury, they should find for her the damages she thereby sustained, unless they believed from the evidence that the company had exercised the utmost care and skill which prudent men are accustomed to use under similar circumstances to ascertain any defects in the car and appliances and secure their safety.

LIABILITY FOR INJURY AFTER CARRYING VEHICLE 25 TO 40 FEET—PROOF NECESSARY IN PERSONAL INJURY CASE — CONTRIBUTORY NEGLIGENCE WHICH WILL NOT BAR ACTION—PROXIMATE CAUSE OF ACCIDENT—TEST.

Rider v. Syracuse Rapid Transit Railway Co. (N. Y., 63 N. E. Rep. 836. May 13, 1902.

The general rule, the court of appeals of New York says, is that in an action to recover damages for personal injuries founded upon negligence it is incumbent upon the plaintiff to prove negligence on the part of the defendant and the absence of contributory negligence on the part of the injured party. The courts have, however, ingrafted upon this rule an important exception, and that is that the contributory negligence of the injured party which will bar an action in his behalf must be the proximate, and not a remote contributing cause of the injury. The plaintiff's contributory negligence, it is said, must not only a be a contributing cause, but a proximate, and not a remote, cause of the injury. The proximate cause of an event must be held to be that which, in a natural sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred. The plaintiff's fault will not affect his cause of action unless it proximately contributed to his injury. It must be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give a right of action. Contributory negligence, however great, is no defense to an action for damages for an injury which was reckless, willful or wanton. When the negligence of the deceased is but a remote cause or antecedent of the injury, while the negligence of the defendant is made the proximate cause of it, then the plaintiff will not be debarred from prosecuting his claim by his negligence, nor will the defendant be excused from the consequences of his.

This action was brought to recover for the death of a man caused by a delivery wagon in which he was riding being struck by an electric car at an intersection of two streets. The accident differed from all such accidents at street crossings only in this respect: that the injury was not inflicted upon the deceased at the instant when the car struck the vehicle, but after carrying it forward upon the track for a distance, which was claimed by the plaintiff to be from 25 to 40 feet, the carriage was overturned, and the driver injured. It was claimed on the part of the plaintiff that the motorman could have stopped the car within the space of 8 feet of the vehicle, while on the part of the defendant the evidence tended to show that it could not be stopped in less than from 50 to 60 feet. Thus, the case turned largely, if not entirely, upon the ability of the motorman to stop a car moving at the rate of from 6 to 9 miles an hour before the collision, and before the carriage in which the deceased was riding was overturned. But the court does not think that the exception to the general rule in cases of this character was properly applied to the facts in this case by an instruction, in substance, that, although the deceased negligently drove upon the railway track, yet the plaintiff could recover if the jury was satisfied that the motorman, upon seeing that the deceased was about to cross, could, by the exercise of reasonable care, have brought the car to a stop before the collision which resulted in the injury. And it holds that it was error to refuse to charge that, if the jury found that the deceased was negligent in going upon the track as he did, there could be no recovery, and that he was not permitted to take doubtful chances as to whether it was safe to cross.

The contributory negligence of the injured party, the court says, cannot be taken from the jury except in cases where it is clear that there was some new act of negligence on the part of the defendant that was the proximate cause of the injury. The negligence of the deceased, if any, was substantially concurrent with that of the motorman, if he was negligent at all. The whole collision was the work of but a moment of time, and to attempt to separate what took place before the contact of the car with the vehicle from what took place afterward would be to create distinctions and refinements that in the end would practically abrogate the rule in such cases that the injured party cannot recover when his negligence is a contributing cause of the injury. In this case, if the deceased was in fact negligent in driving upon the track, when the approaching car was so near as to render the act dangerous, then such negligence could not be regarded as remotely connected with the accident, within the meaning of the rule stated, but a proximate concurrent cause which precluded a recovery. Unless the character of the accident is such that it can be fairly said that the negligence of the injured party is but a remote cause, the exception is not applicable. In determining whether the cause of the accident is proximate or remote the same test must be applied to the conduct of the injured party as is to be applied to the defendant. The conduct of the latter cannot be judged by one rule and that of the former by some other rule.

CARE REQUIRED IN APPROACHING STREET CROSSINGS—FAILURE TO GIVE WARNING—INJURY TO BOY ON TRACK 20 FEET BEYOND CROSSING—UNREASONABLE OR DANGEROUS RATE OF SPEED—DUTY TO YOUNG CHILDREN—RESPONSIBILITY OF CHILD OF SIX OR SEVEN—EXTRA CARE REQUIRED AT CROSSING NEAR SCHOOL.

Chicago City Railway Co. v. Tuohy (Ill.), 63 N. E. Rep. 997. Apr. 16, 1902. Rehearing denied June 4, 1902.

It is incumbent upon those in control of a street car, the supreme court of Illinois holds, to exercise a greater degree of care or watchfulness at street intersections than at other places along the route. Drivers, gripmen and motormen of street cars are obliged at all times to exercise reasonable care in the conduct of their cars; but the requirement of reasonable care imposes upon them a more exacting attention when they approach street crossings in a crowded city, where vehicles and pedestrians may always be expected in front of them. The failure under such circumstances to ring the bell, sound the gong, or give other proper warning, is undoubtedly evidence of negligence to be submitted to a jury under all the circumstances, whether there is an ordinance requiring such precautions or not. The increase of danger to the public at such crossings demands a corresponding increase of vigilance and energy on the part of such drivers, gripmen and motormen. They ought to notice whether or not the track is clear when they approach such public crossings and sound the gong as warning.

In this case, where a boy between five and six years of age was injured, the evidence tended to show that it was about 20 feet beyond a crossing, and that at the time he was backing towards the track, talking with another boy, 11 years old, standing upon the sidewalk or curb. The court intimates that the boy injured was so near to the crossing as to have required a slackening of the speed of the car. But even if he was not sufficiently near the crossing to justify the application of the increased vigilance required of a street car company in approaching a crossing, yet, it says, there was evidence tending to show that the speed of the train was unreasonable and dangerous. Street cars propelled by electricity cannot be lawfully run at a rate of speed which is incompatible with the lawful and customary use of the highway by others. Here the boy had as much right to be upon the street as the company. A street railway company has no property interest in the street, and therefore no right to run its cars at a rate of speed which will interfere with the customary use of the street by others of the public with safety. Such cars can be more readily and quickly stopped than the train of an ordinary railroad. Where the motorman or gripman runs his car at such a rate of speed that he is prevented from keeping control of it, so as to stop it within a reasonable distance upon an appearance of danger to others, the rate of speed at which he propels the car is to be deemed unreasonable or dangerous. It has been held that, where an electric car was running at the rate of 10 or 11 miles an hour over a crossing in a much-frequented street, without giving any signal, there was such evidence of negligence as justified a submission of the case to a jury.

The evidence also tended to show that when the car stopped it had probably passed the boy by about 75 feet, and the court says that it is a question of fact for the jury whether the gripman or motorman on such a car keeps such a lookout as the circumstances demand, or gives such warning of approach as is necessary when he discovers that a child is upon the car track or approaching it, and the circumstance that the car has run an unusual distance before it stops is some evidence of improper management. When a young child is discovered approaching the car track with the apparent intention of crossing in front of a moving car, or is discovered on the track, it is certainly the duty of the gripman to exercise a high degree of diligence in order to prevent injury to the child. A verdict in favor of the plaintiff will not be disturbed where it appears that a street car approaches a street crossing at a very fast rate of speed, without any alarm, while a boy is standing on the track in full view of the motorman, or standing in the center of the track, with his back towards the car.

Moreover, the court says that it is of the opinion, upon further consideration, that, where the testimony shows that a child is only six years old, or less, he is incapable of such conduct as will constitute contributory negligence. In other words, a child of the age of only six years, or under, is exempt from responsibility in the matter of contributory negligence, and so far as the exercise of due care for his own safety is concerned. Again, it says that, in view of the authorities in Illinois, which it quotes, it is certainly justified in holding that a child under six years of age is prima facie incapable of exercising care for his own safety, so that negligence cannot be imputed to him, and in such case it devolves upon the party defending against liability for injurnig him to prove that he has sufficient capacity and intelligence to exercise care for his own safety. And still again, it says that it holds, in analogy to the rule of the common law, which exempts children under seven years of age from criminal responsibility, that up to the age of seven years a child is incapable of such conduct as will constitute contributory negligence, and that the court may so declare as a matter of law.

As to the point sought to be made with regard to the boy's intelligence and capacity to care for himself from the fact that he had been allowed to go alone to a public school for more than a month, to reach which it was necessary to cross the tracks, but which was not more than a block and a half or two blocks from his home, the court says that the presumption was that, in passing the school, the cars obeyed the law, which demands greater care in view of the crossing of the street at that point by children going to school. It did not follow, therefore, that in going to the school every day, which was so short a distance from his home, the boy was running the same dangerous risk as he would run in crossing the track at any other point.

EXTENT OF DUTY WITH REGARD TO KEEPING RAILS FROM PROJECTING ABOVE SURFACE OF STREET.

Citizens' Railway Co. v. Gossett (Tex. Civ. App.), 68 S. W. Rep. 706. May 7, 1902.

The court of civil appeals of Texas holds erroneous an instruction in which the jury was charged that the company would be liable if it permitted the surface of the street to become lower than the rails of the railway track, and which grouped facts that would authorize a recovery if this was the case. It says that if the company had exercised ordinary care to keep the street and the tracks in a reasonably safe condition, so as to permit the crossing of vehicles, it would not be liable, although the rails may have been projected above the surface of the street.

INJURY TO PASSENGER FROM CATCHING FOOT IN RING IN FLOOR OF CAR—EVIDENCE OF RING RISING AFTER ACCIDENT EVIDENCE OF NEGLIGENCE—REPUTABLENESS OF BUILDER OF CAR NO DEFENSE.

Kingman v. Lynn & Boston Railroad Co. (Mass.,) 64 N. E. Rep. 79. May 21, 1902.

The party suing and two other passengers present at the accident testified that the ring in which the former testified that she caught her foot was standing erect immediately after the accident, and was then pushed down by another passenger with an umbrella, and that repeatedly thereafter the same ring whenever the car started after a stop, rose and remained upright until pushed down by some passenger or by the conductor. The supreme judicial court of Massachusetts holds that the evidence was competent. It says that there was no reason to infer that anything about the car was different at the time to which the testimony referred from what it had been when the car left the barn after its morning inspection. If during the time testified to the ring rose frequently as the car started, and remained up until pushed down, this tended to show that it had been doing the like since its use on that day began. Knowingly to use a car in that condition was negligence on the part of the carrier, and the evidence was competent to show that the car had been in fact in that condition for so long a time before the party suing became a passenger that the company should be charged with knowledge of the dangerous condition, or with negligence on the part of the conductor in not ascertaining the danger. In the testimony of the three witnesses as to the action of the ring at the time of and immediately after the acident there was evidence which would warrant the jury in finding that the company and its servants were negligent. However reputable the builder from whom the car was bought, and however usual the particular device of the ring, if the device was allowed to get into and remain in a condition which usually raised it when the car started, it was negligence not to discover and remedy that condition.

SUFFICIENCY OF INDICTMENT FOR OBSTRUCTION OF STREET BY RAILS TOO HIGH AND NOT PROPERLY FILLED BETWEEN—CITY CANNOT AUTHORIZE DESTRUCTION OF REASONABLE USEFULNESS OF STREET.

Commonwealth v. Camden Interstate Railway Co. (Ky.), 68 S. W. Rep. 628. June 3, 1902. "Not to be officially reported."

An indictment read: "The grand jury of Boyd county, in the name and by the authority of the commonwealth of Kentucky, accuse Camden Interstate Railway Company, a corporation, of the offense of creating and maintaining a public nuisance obstructing a public street and highway in the city of Catlettsburg, Ky., committed as follows: The said defendant on the 16th day of Sept., 1901, and on divers other days within one year before said date, in the county and circuit aforesaid, did unlawfully create and maintain a public nuisance on a public highway in a public neighborhood, by so placing its ties and rails as to leave them above the level of the street, and by failing to fill between said ties and rails so as to enable vehicles and wagons to pass over them on Oakland avenue, a public thoroughfare in the city of Catlettsburg, Ky., to the great hindrance, delay, and inconvenience of the traveling public and many people who live in the neighborhood; said defendant being a corporation, and operating a street railway in said city and over said avenue under the laws of the commonwealth of Kentucky. Against the peace and dignity of the commonwealth of Kentucky."

It was contended that this indictment did not state facts sufficient to constitute an offense. Objection was also urged against it because it did not sufficiently specify the points of obstruction. The court of appeals of Kentucky is, however, of the opinion that the charge that it obstructed the street (naming it) sufficiently described the place. Nor does it think that the indictment should necessarily have stated how high the rails were placed above the level of the street, nor how deep the spaces between the rails. The indictment, it says, explicitly charged that it was so constructed that vehicles could not cross the road. If it should turn out in the evidence that the depressions and elevations were only such as reasonably attended the legal and proper construction and operation of the railway, it would, of course, follow that the defendant could not be guilty.

The indictment, it was further insisted, failed to allege that the road was operated contrary to the ordinance of the city. But the court does not think such contention was tenable. The city, it says, would have no power to authorize the construction and operation of a street by a railway company in such a manner as to destroy its reasonable usefulness to the public. In other words, the street could not be entirely destroyed or rendered useless for public purposes simply to suit the convenience of a railway; and it may be fairly assumed that no such ordinance was ever enacted by the city, as a city will not presume to enact an ordinance in violation of the general law of the land.

Wherefore the court holds that it was error to sustain a demurrer to the indictment.

FRIGHTENING OF HORSE BY NOISE AND SMOKE FROM BRUSH HOLDER GROUNDING—PRESUMPTION FROM NOISE AND SMOKE NOT INCIDENT TO ORDINARY OPERATION OF CARS.

Richmond Railway and Electric Co. v. Hudgins (Va.), 41 S. E., Rep. 736. June 12, 1902.

Here it appeared that when the latter-named party, by whom the action was brought, was shown a horse and wagon's length distant from a car, which had one of the older styles of motors and was used in emergencies to take the place of other cars undergoing repairs, he heard the car make a loud, unusual noise, to which neither he nor the horse paid any special attention; but just as the horse got even with the car the car stopped, and an unusual volume of smoke came from under the front of the car, right in the horse's face, which caused the horse to take fright and start to run away. The party pulled the horse up, and, in order to keep it off the curbstone, pulled the left rein harder than he did the right, whereupon the horse darted across the street to the left; and the sudden turn of the wagon threw the party, who was sitting on the right side, out of the wagon, the wheel of which passed over his leg, breaking and crushing it severely. What happened to the car on the occassion of this accident was described as the "brush holder grounding." The supreme court of appeals of Virginia affirms a judgment in favor of the party for $2,000 damages, holding, among other things, that there was no error prejudicial to the company in the giving of the following instruction: "If the jury believe from the evidence that the horse of plaintiff was frightened by the noise and smoke arising from the machinery of the car of defendant, and that said noise and smoke was not incident to the ordinary operation of their cars, they are instructed that this raises the presumption that such noise and smoke would not have been caused if those who had the providing, maintaining, and care of defendant's machinery had used proper care in regard thereto, and, in the absence of an explanation on the part of the defendant showing due care on its part, they may infer that the defendant was guilty of negligence; and if they further believe that such negligence caused the accident as set forth in the declaration, and that the plaintiff was free from fault, they must find for the plaintiff."

SEPARATE TAXATION OF FRANCHISE.

City of Dallas v. Dallas Consolidated Electric Street Railway Co. (Tex.), 66 S. W. Rep. 835. Mar. 6, 1902.

Section 118 of the charter of the city of Dallas provides that "the city council shall have power to levy and collect the ordinary municipal taxes upon the roadbed, rights, franchises, and all other property of street railroads of every kind," etc. Section 134 provides that "the city council shall have power to assess the property and shares of corporations, companies, banks, and such other institutions as the same are now or may be assessed by the state law in such cases made and provided," etc. Section 135 confers the power upon the council to prescribe the manner of rendering and assessing property for the purpose of taxation by the city. The supreme court of Texas holds that the charter authorizes the assessment of the franchise of a street railway company as a separate item in the rendition of its property for taxation, or, as it states it in another place, the city council has the power to require the franchise of a street railway company to be assessed separately from its tangible property.

However, it was insisted on behalf of the company that since, under the ordinances by which it acquired the right to operate its line over the streets of the city, it is required to pay an annual sum for the privilege, it could not be held liable to pay a tax for the franchise. In other words, the contention seemed to be that the sums required to be paid annually are a franchise tax, or are in lieu of such tax, and that the exaction of the tax here in question was double taxation. In some of the ordinances the fixed annual charge so imposed is called a "franchise tax," in others it is called a "bonus," and in still others it is simply imposed without being called by any name. It is clear, the court holds, that the ordinances which simply impose the annual payment as a condition of the grant and those which call such payment a bonus do not import a contract for exemption from taxation of the franchises granted. As to those in which the annual payments are called a franchise tax, the construction is not so clear. Still the court hardly thinks that such designation of itself is sufficient to show such clear and unmistakable purpose to contract for an exemption from taxation as the authorities hold necessary to show a contract for such exemption. But it says that it was not called upon to decide that question in this case. In the absence of legislative authority, a city has no power either to exempt property from taxation or to contract for a commutation of taxes legally assessable upon it. No provision in the municipal charter giving such authority was referred to in this case, and the court takes it for granted that none exists. It would seem, however, it adds, that the fact that the company is required to pay a sum annually for the use of the street is an important matter to be considered in assessing the value of its franchise. It is evident that a franchise burdened with such an exaction is not as valuable as it would be did no such burden exist.

DUTY WHEN A HORSE IS FRIGHTENED AT A CAR—AS TO RINGING OF BELL.

Oates v. Metropolitan Street Railway Co. (Mo.), 68 S. W. Rep. 906. May 21, 1902.

The sum of the adjudicated cases bearing upon the relative rights and duties of street cars and citizens traveling in vehicles drawn by horses or other animals is, the supreme court of Missouri, division No. 1, says, that both have a right to use the street, but that neither has an exclusive right. The operator of a street car is not necessarily obliged to stop the car every time a horse shies or scares at the approaching car; but when the operator of the car sees that a horse is frightened at the car it is his duty to manage his car in such manner as a man of ordinary prudence would do under the same circumstances, and it is always a question of fact for the jury whether such care in the running of the car has been observed. This duty may or may not lead to the necessity for bringing a car to a full stop. The duty of the company in this regard is just the same as the duty of one individual or citizen to another when they meet on the highway and the horse of one becomes frightened at the vehicle of the other, or at anything upon the vehicle of another. Because a street car carries more people than any other kind of a conveyance, or because it is authorized to run more rapidly than a vehicle can ordinarily be legally driven, or because the rush and restlessness of the age makes unreasonable demands for more and more rapid transit along the crowded thoroughfares of populous cities, it does not follow that a street car can be run in disregard of the rights of persons traveling by other means, nor that a street car company is any more exempt from the common-law duty of every one to exercise ordinary care, nor that it is only liable where the agents act wantonly, maliciously, and heedlessly.

Again, the court says that even a court may indulge the information that is possessed by every man that ringing a bell will not stop a runaway horse, or cause him to deflect his course so as to avoid a collision with a street car. The company admitted the ringing of the bell, but sought to justify it on the ground that it was thereby trying to assist the party suing in keeping his horse away from the car. Such an explanation did satisfy the jury, but it fails to satisfy the court. There was ample evidence to sustain the contention of the party suing that the horse became frightened at the approaching car, and began backing until the buggy was forced onto the track, and that the company's agents slowed up the car, but continued to approach the horse, all the while ringing the bell violently, until, when the car was within a few feet of the horse, he suddenly wheeled around, nearly turned over the buggy, ran away in the direction he originally came from, and threw the party suing out and injured him. This being so, a demurrer to the evidence was properly overruled, and the point here principally relied on by the company, that in no event would the party suing be entitled to recover, and therefore the verdict in its favor was for the right party, and the verdict should not be set aside, became untenable.

The true rule is, the court says, that while the bell must ordinarily be sounded to give notice of the approach of the car, still if the operator of the car sees that a horse is already frightened by the approach of the car, and that the citizen is in danger, it is his duty to cease sounding the bell, and to even stop, if necessary; and if, instead of doing so, he continues to sound the gong or ring the bell, and further frighten the horse, and cause him to run away, the company is liable for injuries inflicted in consequence thereof. Of course, if the driver of the horse knows that the horse is liable to become frightened at street cars, and to run away, and with such knowledge drives him on a street with a car line on it, he does so at his own risk. But this does not authorize or justify the operator of a street car to needlessly sound the gong or ring the bell, nor to continue to do so when it is apparent that the only effect thereof is to further frighten the horse.

OLD SPEED ORDINANCES NOT APPLICABLE TO ELECTRIC LINES.

Bonham v. Citizens' Street Railroad Co. (Ind.), 62 N. E. Rep. 996. Feb. 21, 1902.

The supreme court of Indiana holds inapplicable to an action for a personal injury by an electric car a city ordinance of 1864 granting to the company's predecessor in title a franchise and containing a speed restriction, as also an ordinance of 1876 practically re-enacting the latter, and this notwithstanding that the company assumed all of the obligations resting upon its predecessor. It says that there was no claim made, upon the evidence or otherwise, that the company was not entitled to use electricity as a motive power, and, as the court knows judicially that within 15 years last past electricity has become the ordinary motive power that is used in the propulsion of street cars, it feels justified in holding that prima facie the company was rightfully entitled to use electricity for that purpose. Assuming, then, the rightfulness of the company's action in that particular, could it, the court asks, be said that the speed ordinances referred to were violated by it upon the occasion when the party suing was injured?

The court knows that after the advent of electricity as a motive power for street cars such carrier corporations granted the demands of the public for swifter transit, and that by extending their lines into what was before suburban territory such corporations have caused the environs of cities to expand until populous residence districts have sprung up at distances so great from the business portions of such cities as to now be practically inaccessible if there were an enforced return to the rate of speed that obtained in the operation of street cars 20 years ago. At the same time, while it is undeniable that the increased rate of speed at which street cars are now propelled has had a tendency to increase the peril to life and limb and property upon the street, yet that tendency has been in some measure neutralized by the greater care that the public now generally exercise in going upon or along street car tracks. The question as to the maximum rate of speed at which street cars shall be permitted to be propelled along the streets of a city is, in the first instance, at least, a legislative question, and it is evident that the new factors suggested could scarcely fail to receive due consideration in enacting a new ordinance.

Continuing, the court says that it is not called upon to and does not condemn the speed ordinances in question as unreasonable, but it points to the above considerations as manifesting the fact that the ordinances are inapplicable, because almost every material condition is now different from what it was at the time of the adoption of such ordinances. When substantially new factors enter into the problem as to what the written law ought to be as applied to a particular case, then the courts can no longer treat the statute or ordinance as an expression of the legislative purpose as applied to that case. Nor does the court consider that there was under these circumstances any force in the argument that the company ought not to enjoy its franchise without complying with that portion thereof that fixed a maximum rate of speed. The city, it says, has at all times had, and still has, the authority to enact a reasonable speed ordinance.

INJURY OF EMPLOYE BY STARTING OF CAR AFTER INSPECTION OF ELECTRICAL APPARATUS—INSPECTOR A FELLOW SERVANT OF CONDUCTOR.

Shugard v. Union Traction Co. (Pa.), 51 Atl. Rep. 325. Feb. 24, 1902.

When a trolley car reached the terminus of the line on one of its trips, an inspector of the company was there, waiting with a testing car, for the purpose of making an inspection of the electrical apparatus. The test consisted in applying a wire connected with the testing apparatus to the various notches of the controller box, step by step. As the application to each notch was made, and indicated the proper condition, a bell was rung by the chief inspector, and then the assistant proceeded to turn on another notch by means of the controller handle. The test occupied but a few moments of time. The car was not taken away from the motorman or conductor, but was simply halted upon the track. While the test was being made, the motorman was within arm's length of his controller box and of the controller handle, and actually assisted in opening and closing the cover. The conductor, meanwhile, was sitting inside the car, looking over his accounts. There was some evidence to show that upon the completion of the test the inspector made use of the expression: "All right. Put on your pole." But whether or not he used the words, he undoubtedly did signify that the test had been completed and was satisfactory. The assistant inspector stepped down from the platform. The motorman was in the act of stepping upon the platform to take his regular place, when the car suddenly started, and ran upon the conductor, who had untied the trolley pole from the rear platform, to which it had been tied down during the inspection, and in accordance with his duty and his custom at that point had swung the pole around to the other end of the car, when, upon its coming in contact with the overhead wire, the car started.

Under these circumstances, the supreme court of Pennsylvania holds that there was nothing shown for which the company should be justly held responsible. It says that, under any aspect of the case, the inspector was not acting in the discharge of any duty which the law imposes upon the employer, and therefore could not be considered as a vice principal. When the employer has furnished reasonably safe appliances, and made suitable provision for their inspection and repair, his duty is done. He is not liable to an employe for the negligence of another employe who is intrusted with the use or management of the apparatus. The purpose of the inspection made in this case was not to determine the safety of the car, either for the employe or the public. The inspector was merely testing the efficiency of the electrical appliances, and while so engaged was merely a co-employe with his fellow workers. It would never do to hold an employer liable to one employe for the negligent or unskillful use by other reasonably competent fellow workers of the necessary and reasonably safe tools and appliances which had been furnished. The responsibility for this most unfortunate accident must therefore rest upon those who were co-employes of the conductor. The negligence, if any, was theirs, and not the company's.

ASSAULT OF INSPECTOR ON PASSENGER NO CAUSE FOR AWARD OF PUNITIVE DAMAGES—REASONABLENESS OF RULE AGAINST ANY ONE IN COMPANY'S UNIFORM SITTING ON FRONT SEAT OF OPEN CAR—PAYMENT OF FARE HAS NO EFFECT ON RULE.

Rowe v. Brooklyn Heights Railroad Co. (N. Y. Sup.), 75 N. Y. Supp. 893. Apr. 18, 1902.

The version of the party suing was that, while an employe of the company and clad in its uniform, which he owned, and off duty, he boarded one of its open cars, seated himself on the front seat, and paid his fare; and that upon his refusal to leave the front seat and take a place in some other part of the car he was assaulted by one of the company's inspectors. The jury was instructed that it might award punitive damages. The second appellate division of the supreme court of New York holds that this was error. It says that it found no evidence in the record that proved or tended to prove that the company either wittingly or negligently had engaged or had retained an improper servant, or that it had ever authorized him by special command or by general warrant to assault the party suing, or that it had in any way participated in the act, or had ratified or had approved it. It thinks that the charge was erroneous, and required a reversal of the judgment which was rendered for $1,000 in favor of the party suing, particularly in view of the fact that the damages inflicted upon his person and property were but trifling, and were incidental to a mere scuffle or bout at fisticuffs, in which he appeared to have retaliated.

Moreover, the court says that it does not agree with the trial justice in his doubt that the company "had any right to make a rule that if a man is off duty and is riding as a common citizen and wearing his own clothes (i. e., a uniform of defendant, but bought by the plaintiff), he may not ride on the front seat," and in his holding, further on, that, as matter of law, "if such a man paid his fare he had a right to ride there despite any rules," or that, "even though the rule was as stated by counsel for the company on his opening, it gave to them no right to insist upon it if the man paid his fare," or similar holdings as to the validity of such a rule. It is the right and the duty of the company, the court says, to make rules and regulations for both the public convenience and the public safety, and the reasonableness of a regulation is a question of law. The court is of the opinion that a rule of the company that no man in its uniform could sit upon the front seat of one of its open cars while such car is in operation can be sustained as reasonable. It thinks that it promotes the safety of passengers. The car is operated by a motorman who alone applies and withholds the power, and who alone controls the brake and other checks. He stands at the front of the car. Immediately behind him is the front seat. There is no structure between him and that seat. It needs no detail of his duties to show that ordinary care and prudence on his part may require his constant and uninterrupted attention to prevent collisions or other accidents which may be fraught with danger to the passengers. Anything which diverts his attention from his work may entail accident. Conversation between the passengers and the mortorman would tend to divert his attention and to impair his vigilance. The company had a right to assume that acquaintanceship between passenger and motorman might provoke conversation between them. It had the right to assume that an employment common between the passenger and the motorman might have made acquaintanceship between them, or might be a passport to acquaintance. If the passenger and the motorman were both clad in the uniform of the company, it had the right to assume that they were both in its employ. Therefore, when it enacted a regulation that no person in its uniform should occupy a seat which afforded every opportunity to conversation with the motorman, it adopted a regulation which tended to prevent conversation with the motorman, and thus to remove a cause which might divert his attention from his duties. The rule worked, then, for the protection of the passengers, and is entirely reasonable.

Payment by the employe of the fare, the court continues, did not affect the reason of the rule, even though such payment might make him a passenger, in contradistinction of an employe who rode free.

He was still an employe of the company, subject to the presumption that he either knew his fellow employe, or that common employment might beget acquaintance. The fact that the company might have secured the attention of the motorman by a rule that he should not speak to any passenger does not affect the reasonableness of the rule in question. It was argued that the reasonableness of the rule was not to be found in the safety of the carriage, because the rule did not prohibit occupancy of the rear seat. But there is a manifest difference, the court says, between the duties of a conductor and a motorman, for the latter is required to exert a vigilance which, if relaxed for an instant, even to the turning of his head, may bring danger or death, while the momentary inattention of the former is not fraught with any similar degree of peril to the passengers. And the court fails to see that such a regulation is attended with any unnecessary inconvenience to an employe who chooses to become a passenger to the extent of payment of fare. It was not contended that he is shut out from the car of the common carrier, or that he cannot occupy a seat in the place where the main body of the passengers must necessarily be seated.

LIABILITY FOR INJURIES FROM SHOCK FROM SLOT RAIL OF UNDERGROUND TROLLEY AFTER SNOWSTORM—TESTIMONY OF CERTAIN EMPLOYES ONLY OF NO NOTICE OF LEAK—INSTRUCTIONS TO JURY—ESCAPE OF ELECTRICITY AFTER EXERCISE OF PROPER CARE.

Ludwig v. Metropolitan Street Railway Co. (N. Y. Sup.), 75 N. Y. Supp. 667. Apr. 11, 1902.

The party suing gave evidence tending to show that in stepping upon the slot rail of an underground-trolley road he received a shock of electricity in his foot and leg, which precipated him to the ground, whereby he sustained a fracture of both bones of his right leg below the knee. There had been quite a severe snowstorm, and the first appellate division of the supreme court of New York says that there was a sharp question for the determination of the jury as to whether the party's injuries were sustained in consequence of an electrical shock or by his slipping upon the rail. But it says that the trial court fairly submitted that question to the jury, and in the charge in chief instructed them that the burden of proof was on the party suing of showing that his injuries were caused by an electric shock; and it affirms a judgment in his favor. The doctrine of res ipsa loquitur, or the matter speaks for itself, it thinks properly applied to this case, and that the trial court properly instructed the jury that, if the injuries were received through an electric shock from electricity escaping from the company's rail, negligence on its part would be presumed to such a degree as called upon it for an explanation or put it to its proof.

The track master, chief engineer, and electrical engineer of the company testified that they received no notice of any ground or leak at that time, but no one in direct charge of the company's appliances at the power house for indicating a leak was called to give testimony as to whether or not any leak was indicated, or record made thereof. In these circumstances, every inference warranted by the evidence, the court holds, would be indulged in against the company, which, presumably, having the evidence in its possession, omits to produce the same or explain the omission.

A request for an instruction which recited the conceded proper construction of the road, and that there was no evidence that the electric current could escape except as a consequence of the snowstorm, and stated that, if the jury found that the snowstorm was in fact the cause of the party's injury, the company was not responsible for that, and the jury must render a verdict in favor of the company, the court holds was properly refused. It says that it erroneously assumed that there was no evidence that the electrical current could escape except in consequence of the snowstorm; and it likewise erroneously assumed that the company would not be liable if the escape of the electrical current was caused by the snowstorm, regardless of whether the company exercised care to remove the snow.

The jury were instructed that the company's duty was to exercise ordinary care, which is that care that an ordinarily prudent person would exercise under like circumstances, in view of all the circumstances requiring the exercise of watchful care and prudence to prevent the escape of the electric current. It was stated to the jury that the claim of the party suing was that the escape of electricity was due to the failure of the company to clear its slot rails of snow or other substances producing moisture, and their attention was drawn to testimony introduced by the company tending to show that it had exercised care in removing the snow and other substances that might be in the conduit, and they were told, "If you believe such testimony, it will be your duty to render a verdict for the defendant. No evidence to the contrary of the defendant's witnesses as to the cleaning of the tracks and of the slot rails has been given, except such as might be inferred from the accident in question." Evidence was given on the part of the company tending to show that it would be impossible for the slot rails to become charged with electricity, and the jury was instructed that, if they believed this evidence, it would be their duty to render a verdict in favor of the company. The jury were also instructed that if the company had given a sufficient explanation of the accident, or if the accident was unavoidable, and could not have been prevented or guarded against by the exercise of ordinary care and prudence, they should render a verdict in favor of the company. They were also charged that if they should find from all the facts and circumstances that the party suing was free from contributory negligence; that the accident was due to an electrical shock, and not to a fall in consequence of the slippery condition of the sidewalk; that the accident was not inevitable, but one that could have been prevented or guarded against by the exercise of ordinary care and prudence, and that the company was guilty of negligence, then they should render a verdict in favor of the party suing. At the close of the charge the jury were again instructed, at the request of the counsel for the party suing, that, if the slot rails were alive with electricity, and the company, by the exercise of ordinary care, could have discovered and remedied it, the company was liable, provided the party suing received a shock of electricity which caused his injuries. Both at the request of the company and of the party suing, the jury were charged that the burden of proof rested on the party suing, and that, unless he established by a fair preponderance of evidence satisfactory to the jury that his injuries were caused by some negligence on the part of the company, he was not entitled to recover. Again, at the request of the company, the jury were instructed that, if the evidence was as consistent with the absence of negligence on the part of the company as with its negligence, then the party suing could not recover, because he was "bound to make it more than a balanced case." Further, at the request of the company, the jury were instructed that, there being no contractual relations between the party suing and the company, the former could not recover without affirmative proof that the company did not exercise ordinary care in the construction, management, and operation of its railroad on the occasion in question.

The company contended that it had overcome the presumption of negligence on its part raised by the doctrine of res ipsa loquitur, or the matter speaks for itself. But the court says that it did not sufficiently overcome the presumption as matter of law. The question was still for the jury to weigh the evidence introduced on the part of the company, in the light of the legal presumption of negligence arising from the happening of the accident, and determine from the whole whether the party suing had sustained the burden of proof which rested upon him of establishing that his injuries were caused through the negligence of the company. Of course, if the company exercised proper care, and, without negligence on its part, the insulators got out of repair, or the electric current escaped owing to snow or moisture, it would not be liable, unless it failed to remedy the defect within a reasonable time after actual or constructive notice thereof. In this case, however, the presumption of negligence was not so clearly or satisfactorily met as to warrant or require that the case be taken from the jury. Furthermore, the evidence tending to overcome the presumption of negligence was given by the company's employes, whose credibility was for the jury.

BOTH LESSOR AND LESSEE COMPANIES LIABLE FOR INJURIES.

West Chicago Street Railway Co. v. Horne (Ill.), 64 N. E. Rep. 331. June 19, 1902.

The law is well settled, the supreme court of Illinois says, that when an injury results from the negligence or unlawful operation of a railway, whether by the corporation to which the franchise is granted or by another corporation which the proprietary company authorizes or permits to use its tracks, both the lessor and lessee are liable to respond in damages to the party injured.

CARE REQUIRED OF STREET RAILWAY AS COMMON CARRIER OF PASSENGERS—TO GIVE WARNING IF STOPPING PLACE IS UNSAFE.

Montgomery Street Railway v. Mason (Ala.), 32 So. Rep. 261. Apr. 9, 1902. Rehearing denied June 2, 1902.

It cannot be doubted, the supreme court of Alabama says, that street railway companies, as common carriers of passengers for hire, are under the duty of exercising the highest degree of diligence and care in conserving the safety of their passengers, and are responsible for the slightest neglect. This duty arises when the relation of carrier and passenger begins, and continues until that relation is ended. The same duty of exercising the highest degree of diligence and care in the carriage or transportation of passengers in law and reason extends to and includes the safe landing of the passenger at the termination of his journey or ride, and this duty is not performed when the carrier lands its passenger at a time and place of such unknown environment to him that, in his first effort to depart after alighting onto the ground, he is tripped and thrown by an unseen pile of lumber and debris. And the court holds that if a car stops where it is unsafe for passengers to alight, it is the duty of the company to give warning.

NO INJUNCTION AGAINST DISPOSAL OF MATERIAL BY CONTRACTOR FOR ROAD.

Orleans & Jefferson Railway Co., Limited, v. International Construction Co. (La.), 32 So. Rep. 218. Mar. 31, 1902. Rehearing denied May 26, 1902.

The mere fact that a contractor who has undertaken to build and equip a street railroad has assembled certain material with the intention of using it for the purposes of the contract gives the other contracting party no proprietary interest in such material, nor does it give him the right to control the disposition of it. Hence, the supreme court of Louisiana holds, an injunction will not lie at the suit of the other contracting party to prohibit the contractor from removing such material or otherwise disposing of it.

FAILURE TO APPREHEND THAT BOY WILL JUMP FROM BACK OF WAGON AND RUN UNDER CAR—DUTY IN PASSING LOADED WAGON.

Baier v. Camden & Suburban Railway Co. (N. J. Sup.), 52 Atl. Rep. 215. June 9, 1902.

A motorman is not chargeable with negligence, the supreme court of New Jersey holds, because he fails to apprehend that a boy who is riding on the back of a wagon will jump from the wagon and run under his car while he is engaged in looking at the wagon in order to pass it without a collision. The car in this case slowed up as it approached the wagon, which was loaded with about 100 sugar and flour barrels ,giving it the appearance, as to dimensions, like that of a wagon loaded with hay or straw. The motorman, the court says, was under no duty to stop the car. He had a right to pass the wagon, using due care to do so without striking it.

UNEXPLAINED FALL FROM STREET CAR—DOCTRINE OF RES IPSA LOQUITUR NOT APPLICABLE.

Paynter v. Bridgeton & Millville Traction Co. (N. J.), 52 Atl. Rep. 367. June 16, 1902.

A mere fall from a street car, without any evidence to show how the fall was occasioned, the court of errors and appeals of New Jersey holds, raises no presumption of negligence on the part of the operators of the car. Again, it says that a fall while alighting from a street car is not such a fact, standing alone, as to authorize the application of the doctrine of res ipsa loquitur, or the matter speaks for itself. The doctrine of res ipsa liquitur is applicable only when the thing shown speaks of the negligence of the defendant, not merely of the happening of the accident. If it had been proved that a jerk or jolt of the car had produced the fall, that fact, unexplained, might be said to prove the defendant's negligence, although the defendant might furnish an explanation of it which would relieve from responsibility.

FALL OF PERSON INTO FENDER NOT CONCLUSIVE EVIDENCE OF HIS POSITION WHEN STRUCK.

Hoyt v. Metropolitan Street Railway Co. (N. Y. Sup.), 76 N. Y. Supp. 832. June 6, 1902.

The fact that the party suing was thrown into the fender, the first appellate division of the supreme court of New York says, was by no means conclusive of his position at the time when he was struck. No accurate law of physics can be invoked to determine just how a body ought to fall or will fall when struck under such circumstances. There is the action of the car, the life and movement of the person, and very strange results may and do flow from the operation of both forces. They are not to be accounted for upon any rule which might find application to an inanimate body. The question of this party's position when he was struck, whether, as he testified, he was just leaving the track on which the car was running at the time he was struck, or whether, as the company sought to make out, he could not in any event have gotten further than the center of the track, was therefore for the jury.

$2,000 FOR INTERNAL INJURY CAUSED TO PASSENGER HOLDING TO STRAP BY SUDDEN STOPPING OF CAR.

Chicago City Railway Co. v. Morse (Ill.), 64 N. E. Rep. 304. June 19, 1902.

The evidence in this case showed that the car upon which the latter-named party was riding was greatly crowded, and he was compelled to stand in the aisle, and hold to one of the straps suspended from the ceiling, provided for that purpose, and that on one occasion the car came to a sudden and violent stop, throwing the passengers forward who were standing, and some of them were violently thrown against him. He testified that, in order to prevent his being thrown off his feet, he held onto the strap, and at the time felt a sharp pain in his right groin, and that after getting off the car and proceeding to the place of his employment he discovered that hernia had been developed. This evidence was corroborated, and clearly tended to support the declaration. The question was therefore, the supreme court of Illinois holds, one of fact, which was properly submitted to the jury. As to the contention that the $2,000 damages allowed were excessive, the supreme court says that likewise was a question of fact settled by the judgment of affirmance in the appellate court, which judgment the supreme court affirms.

INJURY TO ONE PASSENGER BY ANOTHER BEING THROWN UPON HER IN CAR ROUNDING CURVE.

Merrill v. Metropolitan Street Railway Co. (N. Y. Sup.), 77 N. Y. Supp. 122. June 13, 1902.

In this case, where a passenger on a cable car was injured by another passenger falling on her, which fall was caused by a jerk in the car rounding a curve, the first appellate division of the supreme court of New York says that the rule would seem to be applicable that the company was only liable for the failure of the gripman to use that skill and care which would be required by an ordinary careful and prudent man. There was nothing here to suggest that this second passenger, in entering the car when he did, would cause an injury to the other passengers. In the absence of excessive speed or the application of more power than was necessary to round this curve, there would certainly be no evidence to justify the jury in finding that the company was negligent, and, the jury having found that the speed of the car was not excessive, the company was entitled to a verdict. The fact that the person who was thrown upon the other had been talking to the conductor while the car was going through the street from which it turned at the curve would also seem to be immaterial, as this conversation with the conductor had no relation to the accident.

LIABILITY FOR NEW PAVING.

Borough of West Chester v. West Chester Street Railway Co. (Pa.), 52 Atl. Rep. 252. June 4, 1902.

An accepted ordinance provided that the company should at all times keep the space between its tracks and eighteen inches outside thereof in good repair and to conform to the macadamizing or paving in the borough, and that whenever the borough should thereafter pave or macadamize any street or streets along the line of the railway, with asphalt blocks, asphalt sheeting or broken stone, the company should at the same time pave and macadamize the street occupied by the railway, that is to say, between the tracks and eighteen inches outside thereof, on each side of the railway, with the same kind of block or material with which the borough paved and macadamized the street or streets. A relief resolution provided that by way of encouraging the construction of an efficient street railway in the borough the company be relieved from the obligation of keeping in repair the street, streets or parts of streets, occupied by its tracks, until such time as it should either earn or pay a dividend to its stockholders on its capital stock. The supreme court of Pennsylvania holds that, under this contract, the company was liable for paving between the rails of its road, and eighteen inches outside each rail where a macadam pavement which was down was removed from the streets in the business portion of the borough and one of asphalt laid in its place.

WHEN INTERURBAN RAILROAD AN ADDITIONAL BURDEN ON PUBLIC HIGHWAY AND ELECTRIC PLANT ANOTHER ADDITIONAL BURDEN—RIGHT OF ABUTTERS TO INJUNCTION.

Schaaf v. Cleveland, Medina & Southern Railway Co. (Ohio), 64 N. E. Rep. 145. Apr. 22, 1902.

The construction and operation of an interurban railroad laid with T-rails, entirely on the side of a public highway next to the abutting improved farms owned and occupied by the plaintiffs, and entirely between their lands and the traveled part of the highway,—the company having authority to run an unlimited number of cars and trains for the carrying of passengers, and the transportation of freight, express matter, and government mail,—the supreme court of Ohio holds, is an additional burden on the public highway, and obstruction to and interference with the plaintiffs' easements and rights therein, not substantially different from those that are imposed by the construction and operation of steam railroads under like conditions.

The construction and operation of an electric plant in connection with such railway, and on the same side of the traveled public roadway, for supplying heat, power, and light to consumers for profit, constitutes another additional burden, which is an invasion of the plaintiffs' property rights.

The plaintiffs are entitled to injunction, in such case, to prevent the construction and operation of such railroad and of such electric plant, or either, until compensation and damages shall be assessed them in a proper appropriation proceeding, and paid, or secured to be paid.

NOT ASSESSABLE FOR PAVING AS OWNER OF LOT OR PARCEL OF LAND.

North Jersey Street Railway Co. v. Mayor, Etc., of Jersey City (N. J. Sup.), 52 Atl. Rep. 300. June 9, 1902.

Where a city street had been paved and improved under a statute authorizing the board or body having control of the streets and highways of any city of the first class of the state to pave or otherwise improve any street, avenue, or public highway in such city, and to cause so much thereof as should equal the amount of benefits to be assessed by its proper officers upon the property specially benefited thereby, the supreme court of New Jersey holds that an assessment of such benefits made upon a street railway constructed and operated along the street in question under the authority of a municipal ordinance was unauthorized, and should be set aside. It bases the decision upon the ground that the right of the railway company to locate its tracks in the street and operate its railway therein was not a lot or parcel of land, within the meaning of the statute, which, among other things, directed the commissioners, in making their assessment, to make therewith a report and map showing the benefit to each lot or parcel of land specially benefited by the improvement. An ordinance of the city requiring the railway company to pave the space within its tracks and two feet outside the same, the court further holds, gave no authority in support of such an assessment made against the company under the above statute.

LIABILITY FOR PAVING PROPORTIONATE TO SPACE OCCUPIED BY ROADBED—ROADBED DEFINED INJURY TO PAVEMENT IN STRENGTHENING TRACK.

City of Shreveport v. Shreveport Belt Railway Co. (La.), 32 So. Rep. 189. May 12, 1902.

Under a statute making a street railway company liable for that proportion of the cost of paving a street in which it has its track equivalent to the space occupied by its roadbed, the supreme court of Louisiana, which has held that when cross-ties were used that extended to a width of seven feet, the roadbed must be taken as measuring seven feet, now holds that when girders or sleepers are used, the narrower roadbed, which consists of the foundation on which the superstructure rests, is alone to be taken as the width in fixing the company's proportion of costs. The rails are the superstructure. The roadbed does not include part of the adjacent roadway on which rails do not rest. The proportion of the space being limited to the roadbed, the court is without authority to take the outside of the track into account on the ground that the road is benefited by the adjacent pavement. With regard to the statement in the argument for the city that there was already trouble about the superstructure of the track and that in order to build and strengthen the concrete cubes it would disturb and weaken at least a foot of the street on the outside of each bed, the court says that it inferred that the necessity of these changes or repairs was very remote; besides, if it should arise, in its view it would devolve upon the railway company to make the repairs at its costs.

INJURY TO CONDUCTOR FROM OVEREXERTION ON TURNTABLE OUT OF REPAIR.

Roberts v. Indianapolis Street Railway Co. (Ind.), 64 N. E. Rep. 217. May 27, 1902.

It was the duty of the conductor and motorman in charge of each car to run it onto a turntable and turn it around at the end of the line. The turntable became out of repair, and a conductor in trying with the motorman to turn it strained and severely injured himself internally. But conceding that the company, under the alleged facts, was guilty of negligence in failing to keep the turntable in proper repair, the supreme court of Indiana holds that nevertheless the complaint, under its averments, clearly established that the conductor, in exerting or straining himself in turning the table, was also guilty of negligence which contributed as a proximate cause to the injuries which he sustained; hence the case was ruled by the maxim of "Damnum absque injuria," a loss without a wrong, and he could not recover in this action. It says that the conductor was under no obligation to the company to overexert or strain himself in his effort to turn the table, and certainly, under the circumstances, the company could not anticipate or foresee that by reason of its failure to repair the table there was any necessity to protect him against his own voluntary action in subjecting himself to the overexertion or strain which resulted in the injury of which he complained. He was shown to have known of the condition of the table, and, from his previous experience in the operation thereof, he certainly was aware of the extra effort or force that was required to operate the table. He was presumed to have known his own strength, and in fact he himself was the only one who, under the circumstances, could measure the extent to which he could safely exert himself in his effort to turn the table. The company neither exacted nor had the right to exact of him any overexertion of his strength in turning the table; hence he assumed whatever risk there was due to such overexertion or strain to which he voluntarily subjected himself. If the complaint could be said to show actionable negligence on the part of the company, it also, under the facts, established a defense in its favor, and therefore, under a well-settled rule of pleading, was bad on demurrer.

AGAINST INJUNCTION PENDING LITIGATION OVER LEASE OF ROAD.

Content et al. v. Metropolitan Street Railway Co. et al. (N. Y. Sup.), 76 N. Y. Supp. 749. June 6, 1902.

The plaintiffs, as stockholders of the Metropolitan Street Railway, brought this action to perpetually enjoin and restrain the defendants from delivering or carrying into effect a proposed lease between the Metropolitan Street Railway Company and the Interurban Street Railway Company. An injunction was granted pending the return of an order to show cause why the same should not be continued during the pendency of the action. But upon the return of the order the injunction was vacated, and the first appellate division of the supreme court of New York holds that the facts justified the refusal to continue the injunction. It says that the lease was executed by the board of directors of the respective companies, and was approved by unanimous vote of the stockholders of the Interurban Street Railway Company, and by over 80 per cent. of the stockholders of the Metropolitan Street Railway Company; and whether the board of directors of the latter company had the power to make such lease, as approved by such a large majority of its stockholders, ought not to be determined upon ex parte affidavits, or affidavits from or upon one side, but rather should be left to a trial where all of the questions bearing thereon could be thoroughly considered and passed upon, when all of the evidence in relation thereto was presented. Moreover, as it was stated upon the oral argument, and the statement was not denied, that the lease had, in fact, been delivered and that possession of the property leased had been taken, the court says that if the order should be reversed, it would not result in any possible advantage to the plaintiffs, but might be of great injury to the defendants, and that therefore it was of the opinion that the parties should remain in the condition they were until the trial and determination of the merits of the controversy, and if, upon a trial, it should ultimately be determined that the defendants had no authority to enter upon the lease, then the same would be set aside, and the property restored to the lessor, and the plaintiffs' rights thereby would be fully protected.

STARTING CAR BEFORE INFIRM OR OTHER PASSENGER IS SEATED.

Herbich v. North Jersey Street Railway Co. (N. J.), 52 Atl. Rep. 357. June 16, 1902.

In the case of a plaintiff two years and nine months old, who was thrown down by the starting of a street car, which she had boarded, before she had time to be seated, and while she was for the moment out of the reach of her attendant, who was also boarding the car, the court of errors and appeals of New Jersey holds that it was not error to refuse to charge the jury "that the starting of a car before a passenger is seated is not negligence." It says that, as applied to the circumstances for which the plaintiff contended, the proposition was untrue, or at least it was for the jury, not the judge, to say whether it was true. While usually the proposition may be accepted as true, yet the passenger may be so infirm, by reason of infancy or old age or sickness or lameness, or other cause, that even the ordinary movement of a street car in starting before he is seated would be likely to throw him down. In such cases, if the carrier is chargeable with notice of the infirmity, it cannot be the duty of the court to instruct the jury that the starting of the car is not a breach of the carrier's obligation to exercise a high degree of care for the safety of the passenger. In the present case the infirmity of the plaintiff was evident, and must have been observed by the conductor, who, according to his own testimony, had the mother and child in view from the time when they began to board the car until the accident happened.

WHEN DUTY AS COMMON CARRIER ENDS—RISKS ASSUMED BY PERSON WALKING BACK ON RAILROAD AFTER ALIGHTING FROM CAR.

Indiana Railway Co. v. Feirick (Ind.), 64 N. E. Rep. 221. May 27, 1902.

According to the complaint in this case, a passenger on an interurban line was put off at the wrong road crossing, on a cold, dark and stormy night. He did not know where he was, except that he was east of the point where he wanted to stop, and did not know of any other route to that point. But all of his averments concerning his taking passage on the car, his place of destination, his want of knowledge of the route, the circumstances of his leaving the car, the supreme court of Indiana says, were merely recitals, as matter of inducement, to show that he was rightfully on the railroad, when, while proceeding with all due care and prudence, he struck his foot against a stake that the company's agents or employes had carelessly and negligently left sticking above the ground four or five inches, and was thrown to the ground, and greatly injured. Under the complaint, as it stood, the court must assume that his discharge from the car was satisfactory to him or justifiable. If satisfactory or justifiable, then the company's duty to him as a common carrier was performed when he left the car safely. And as he stood upon the crossing, after the departure of the car, in the absence of any showing to the contrary, his relation to the company was the same as that of a stranger. This being so, when he took up his journey on the company's private railroad without invitation he did so with no greater rights than an ordinary licensee, taking upon himself all the perils that were incident thereto.

NO IMPLIED CONDITION OF ROAD BEING AUTHORIZED OUTSIDE OF TOWN—VOLUNTARY DEPOSIT OF MONEY CONTRARY TO PUBLIC POLICY NOT RECOVERABLE.

West Springfield & Agawam Street Railway Co. v. Bodurtha (Mass.), 64 N. E. Rep. 414. June 18, 1902.

Where a street railway company deposited $2,000 with the selectmen of a town, to be turned over to the town treasurer if 10 miles of road was not in operation within a year, and under the location more than 10 miles of railway could have been built in that town alone, the supreme judicial court of Massachusetts holds that there was no ground for implying a condition that the company should be authorized to build outside of that town. Furthermore, it says that it was plain from the facts found by the master that the obligation to pay over the $2,000 was not one imposed by the selectmen at their own instance, and that such a payment was first suggested and offered by the company itself, in asking for a location, and that the condition, as incorporated in the grant of location, was one drafted by its own attorney, and was more than once accepted by the company. Under such circumstances, the payment was not involuntary or constrained. The company was in this position: If the condition was a proper one, there was no reason why the company should have the money back. If it was against public policy, the company could no more have the help of the courts to recover the money than to recover a bribe. It did not act under any necessity, but of its own voluntary choice; and, in declining to aid in the recovery of money voluntarily paid against public policy, the courts leave the plaintiff where it has seen fit to place itself.

DUTY OF MOTORMAN WHEN ANIMALS ON HIGHWAY BECOME UNEASY—TAKING CERTAIN HORSES ON STREET-CAR STREET.

Doran v. Cedar Rapids & Marion City Railway Co. (Ia.), 90 N. W. Rep. 815. June 3, 1902.

The injury complained of by the party suing was received while he was riding on horseback, leading a stallion. An instruction was asked stating as a matter of law that it was not the duty of the motorman to stop the car or check its speed unless he saw the horses showing signs of uneasiness or fright, but that it was only his duty to stop the car as quickly as he could, in the exercise of ordinary care, as soon as he saw the party's peril. This, however, the supreme court of Iowa thinks was not a correct proposition of law. It says that much must depend on the rate of speed at which the car is going, the extent to which the person in charge of the animals appears to have lost control thereof, and the imminence of the danger that they will get upon the track, in the way of the car, so as to imperil their own safety and that of the person in control of them. In other words, the supreme court does not understand it to be the rule that the motorman of a street car may run his car at a high rate of speed, even though such speed would not in itself be unlawful, notwithstanding he sees that a person on the street is liable to be dragged or taken upon the track, and is under no obligation to check his car or prepare to avoid a collision until it becomes certain that a collision will take place unless the car is stopped. According to the instruction asked, there is no duty on the part of the motorman to do anything until the animals in such a case actually obstruct the passage of the car. But the rule requiring the motorman of an electric car to do what he reasonably can to avoid a danger which is reasonably apparent seems to the court too elementary to require elaborate citation of authorities. It would certainly not be necessary in all cases that the car be stopped as soon as it becomes evident that animals on the highway have become uneasy and even frightened, but it certainly is his duty to take reasonable steps by way of reducing the speed of th car to avoid an injury which he may anticipate as likely to result from the frightened condition of animals on the street. Persons who are using the public streets on which a car line is operated have a right to the use of the whole of such street, and are not negligent per se, or in and of itself, in being on or near to the street car track, and it plainly is the duty of the motorman to be on the lookout for the purpose of avoiding collision with and injury to persons using the street.

Again, the supreme court says that it does not think that it constitutes negligence per se to take horses along a street on which a street car line is operated, without knowledge as to what will be the probable conduct of the horses on the approach of a car. It certainly cannot be true as a matter of law that one taking animals upon a street upon which an electric car will pass should have first tested or made inquiry as to the probable conduct of the animals on the approach of such a car. These are considerations for the jury. There is no reasonable controversy as to the duty of one going upon a street to avoid a known danger, and the court correctly said that, if the party suing knew that it would be dangerous to take the horses along this street, then, if he could without serious inconvenience have taken another street, it was his duty to do so. But that, the supreme court thinks, is as far as the rule goes. It was not for the court to say as matter of law, in the absence of proof of knowledge on the part of the party suing that the horses would probably be frightened by an electric car, that it was his duty to know whether they were likely to be frightened, and to take another street if he did not have that knowledge.

CARE REQUIRED TO PREVENT INJURY TO EMPLOYES IN RECONSTRUCTION OF ELECTRIC ROAD—SHOCK TO LABORER AIDING IN CARRYING RAIL COMING INTO CONTACT WITH IRON POLE.

Thompson v. New Orleans & Carrollton Railroad Co. (La.), 32 So. Rep. 177. Apr. 14, 1902. Rehearing denied May 27, 1902.

There being great danger of accident in carrying on the work of reconstruction of the overhead lines and the railway track of an electric railway system, as in handling heavy rails, from the falling of poles, danger of wires coming in contact with grounded poles and forming circuits, and other risks attending the reconstruction of an electric railway, the supreme court of Louisiana holds that it imposes a high degree of responsibility on the company, in order, by every reasonable means, to prevent injury to its employes. Here a laborer, engaged with others in carrying a heavy rail, which came into contact with an iron trolley pole, received an electric shock which killed him. The court, which affirms a judgment for damages, says that it was led to believe from the facts that there was a live wire uninsulated, or defectively insulated, resting on the pole in question, and that companies are liable for accidents due to defective insulation, or to failure to take proper precautions to prevent conductors of electricity from coming into contact with their trolley wires. It further considers it specially requisite to warn the employes of the danger when it is as great as it was in this case. That those in charge expressed some apprehension lest accident, in view of the danger, would occur, could not have the effect of releasing the company from all responsibility. In this case, although the plan of general operations may have been good enough, and the officers mindful of their trust, it did not relieve the company from indebtedness for injury due to some oversight or negligence resulting in a fatal accident to one of a gang of 20 laborers. Whatever special patrol or warning party there may have been, it was not shown that it sought to warn him of the danger by which he was surrounded. The risk was not one assumed by the employes.

DERAILMENT AT POINT WHERE TRACKS RUN FROM MAIN LINE INTO CAR STABLES—DUTY TO SEE THAT CARS ARE PROPERLY MANAGED AND THAT TRACKS ARE REASONABLY SAFE.

Hollahan v. Metropolitan Street Railway Co. (N. Y. Sup.), 76 N. Y. Supp. 751. June 6, 1902.

Where a passenger on a horse car was thrown from the front platform and it was established by the evidence that the car jumped the track and left the rails at a time when it was going at a "pretty good rate" at a place opposite the car stables, and at a point where there were tracks leading out from the main track into the doors of the stable, the first appellate division of the supreme court of New York holds that, although it might be said that the evidence was not strong and highly satisfactory in support of the inference of negligence which it was within the province of the jury to draw from the facts set forth, still it was sufficient. It says that it is true that the railroad has not a monopoly of that part of the street upon which the rails are laid, nor the right to exclude others from the use thereof, yet it has the paramount right and the exclusive management of its own cars, and control for the purpose of laying and keeping in repair its own rails, and the corresponding duty rests upon it of seeing that the cars are properly managed and that the tracks are at all times reasonably safe. This duty involves the obligation, further, of operating the cars with reasonable care so as to avoid at dangerous points, such as at curves or intersections with other tracks, accidents which are likely to happen from the negligent operation of the cars. The tracks are constructed for the purpose of having the cars remain upon them, and experience proves that they are well adapted for that purpose; and it would not only be unusual and extraordinary, but highly improbable, that a derailment would occur without some intervening cause. It could not be assumed, therefore, with respect to this accident, that in the ordinary operation of the car over the tracks it would leave them without the car having met with some obstacle on the track, or being dragged or thrown therefrom by some superior force. The proof eliminated the latter, and there was no suggestion in the record that there was any stone or any obstruction which impeded the car's progress, other than the switch rails, which, at the point of the accident, as before stated, ran from the main track into the car stables. The care of these switches was as much under the company's control as any portion of the tracks; and if the further fact had been established that the accident was actually caused by the switch being open so as to change the direction of the car from the main to the branch track, there would be no room for discussion but that with this additional evidence it would be clearly a question for the jury to determine as to whether or not the accident was due to the negligence of the company in not properly looking after the switch track so as to prevent such accident. With that fact out, however, and with no evidence to show that the accident was caused in any other way than by contact with the switches which there existed, was not the company's negligence properly a question for the determination of the jury? Though close, the court is inclined to think it was, and for the reason that, regard being had to the circumstances and the character of the occurrence, the inference that the accident was due to the switch track, as the intervening cause, was both a direct and natural one.

INJURY TO BOY RUNNING INTO CAR WHEN LET LOOSE AFTER BEING HELD AND LECTURED.

Palmisano v. New Orleans City Railroad Co. (La.), 32 So. Rep. 364. March 17, 1902. Rehearing denied June 30, 1902.

Where urchins have been stealing rides by hanging onto the rear end of a gravel train or gravel car drawn by an electric street car on the street of a city, the supreme court of Louisana holds that the employe in charge of the train, as, for example, the motorman, who has in vain tried to make them desist by warnings and threats, is entirely justified in catching hold of one of them and lecturing him.

If the employe's lecture has been temperate, and he has not rough-used the boy, but has merely held him, and no longer than was necessary for the purpose of the lecture, he or his employer is not responsible if the boy (a child eight years, lacking three month, old), on being turned loose, runs blindly in a direction converging with that of a coming car, and collides with the car and is injured.

HOLDER OF PRIOR MORTGAGE FROM LESSOR HAS NO LIEN ON FEED WIRE FURNISHED BY LESSEE.

Kansas Loan & Trust Co. v. Electric Railway, Light & Power Co. of Sedalia, Mo. (U. S. C. C., Mo.), 116 Fed. Rep. 904. July 14, 1902.

A feed wire furnished by a lessee of an electric railway may be removed by the latter where its only obligation is to take, maintain, and restore the leased property in the condition in which it found it, and a holder of a prior mortgage from the lessor, with a subsequently acquired property provision, the United States circuit court holds, does not acquire any lien thereon.

CONDUCTOR'S DUTY TO MAKE PASSENGERS STANDING ON STEPS GET OFF OR RETURN INTO CAR.

Brace v. St. Paul City Railway Co. (Minn.), 91 N. W. Rep. 1099. Oct. 31, 1902.

There was evidence in this case tending to show that the plaintiff was standing upon the steps, refusing to get off or go back into the car, and the supreme court of Minnesota says that it was proper for the court to instruct the jury that it was the conductor's duty to use such reasonable force as might be necessary to make him get off or return into the car. The conductor was charged with the duty of conserving the interests of the other passengers. It would be unreasonable for a person to take possession of the steps, thus preventing the closing of the gates, and hold the car in waiting, and the duty devolved upon the conductor in charge of the car to use reasonable means to prevent undue delays and interruptions.

STRIKING OF PERSON NEAR TRACK BY BODY OF CONDUCTOR PASSING ALONG FOOTBOARD OF MOVING CAR.

United Railway & Electric Co. of Baltimore City v. Fletcher (Md.), 52 Atl. Rep. 608. June 19, 1902.

A city employe standing on the side of a ditch which was three feet from the railway track was injured by coming in contact with the body of a conductor who was passing along the footboard at the side of a moving open summer car. The court of appeals of Maryland holds that it was improper to let the case go to the jury to be determined by surmise and conjecture, in the absence of reasonable evidence of any act of negligence or failure of duty on the part of the conductor. It says that the evidence went only so far as to show that the body of the conductor, while passing along the footboard of the moving car, struck and injured the man. The conductor not only had the right to pass along the footboard of the car when it was in motion, but the discharge of his duty required him to do so very frequently. It is a well-known fact that the footboard is a narrow one, and a conductor, in order to pass along it in safety, especially if he has to lean in between the successive seats to collect fares, must, in passing by the upright standards of the car, give to his body a swaying or swinging motion. There was no evidence that the conductor in this case acted in a negligent or unlawful manner when passing along the footboard. The entire space between the railway track and the ditch was but three feet, a considerable part of which must have been occupied by the overhanging part of the car and the footboard. Under these circumstances the mere fact that the man, while standing in the narrow space between the car and the ditch, came in contact with the body of the conductor, was not per se or in and of itself even prima facie evidence of negligence on the part of the latter.

DUTY OF MOTORMAN ON CAR DESCENDING GRADE IN CITY TO LOOK OUT FOR YOUNG CHILDREN—CHILD RUNNING INTO PASSING CAR—ORDINANCE REQUIRING CAR TO BE STOPPED IN SHORTEST TIME POSSIBLE ON APPEARANCE OF OBSTRUCTION.

Gray v. St. Paul City Railway Co. (Minn.), 91 N. W. Rep. 1106. Oct. 31, 1902.

Where street railway tracks occupy a street at the foot of an incline which, in conjunction with other streets, forms a system of crossings in a populous part of the city, the supreme court of Minnesota holds that it is the duty of the motorman in charge of a car coming down the grade to keep a lookout for young children approaching the crossings or standing near the tracks, and to take reasonable precaution to prevent injury to them, by sounding the gong, checking the speed of the train, and holding it under control. Moreover, it says that it could make no difference in this case that the front part of the car had passed the children, and that the boy, who was 5 years and 9 months of age, came in contact with the second part or rear of the train, for the evidence tended to show that they were either standing in close proximity to the cars at the time the motorman passed them, or that they were approaching it with the intent of crossing the track, either upon a walk or running. It was for the jury to say whether it was reasonably to be apprehended that such young children might run into or come in collision with the car as it was passing.

An ordinance providing that "No person having the control of the speed of a street railway car passing in a street shall, on the appearance of any obstruction to his car, fail to stop the car in the shortest time and space possible," the court holds is not unreasonable, in that it requires the stopping of the car without regard to the safety of the train and persons therein. It is no more than a declaration of the law, and only requires the person in charge of the car, upon the appearance of an obstruction, to stop the car as soon as possible under the circumstances, with due regard for the safety of the passengers.

NOT AN ATTEMPT TO CONDEMN AND APPROPRIATE A PUBLIC STREET OR TO BUILD AN ELEVATED RAILROAD THEREIN.

State v. Superior Court of King County (Wash.), 70 Pac. Rep. 484. Oct. 15, 1902.

Where a dedicated and platted street had never been improved and could not be used for the purposes of a public street by reason of the fact that it was merely a vacant strip of tide land, 66 ft. in width, over which the tide regularly and freely ebbed and flowed, and it was sought to ascertain the amount of compensation which should be paid to an abutting property owner on account of building a railway line and roadway along said street, under a statute granting the power of eminent domain to electric railway corporations, but providing that said right of eminent doman should not be exercised with respect to any residence or business structure or structures, public road or street, it was argued that the company was endeavoring to appropriate a public street for the purposes of its railway, in contravention of the statute, or that it was at least undertaking to build an elevated railway in a public street of the city, which it had no right to do, in the absence of direct legislative sanction. But the supreme court of Washington does not think that the company was either attempting to condemn and appropriate to its own use a street, or to construct an "elevated railroad" on a street, within the meaning of that phrase, as understood in localities where such railways are in common use. An elevated railroad, properly speaking, it says, is one which is placed above the surface of the street which is used by the general public; but such was not the character of the structure which the company was required by the city to erect in this case, where the city, by ordinance, granted to the company the privilege of laying its tracks in this platted and dedicated street—as it was clearly empowered to do by law—and required the company, as compensation for such privileges, to construct a plank roadway or bridge (designated in the record as a "trestle and bridge") not less than 22 feet in width, and upon a grade at a height specified in the ordinance, and to maintain the same for the use of the public as a street as well as for its railroad tracks. It would seem, the court says, that what the company was really seeking to do, and what the city required it to do, under its franchise, was, not to condemn and appropriate a street, but virtually to make a street where none had theretofore existed.

CARE REQUIRED OF PERSONS CROSSING TRACKS—ORDINARY CARE DEFINED—WHAT PHRASE "LOOK AND LISTEN" MEANS.

Beerman v. Union Railroad Co. (R. I.), 52 Atl. Rep. 1090. July 2, 1902.

A railroad track, whether steam or electric, the supreme court of Rhode Island holds, is a place of danger, and a person crossing it, whether on foot or in a vehicle, must exercise ordinary care for his own safety to exonerate him from the charge of contributory negligence, and what is ordinary care under one set of circumstances might amount to negligence under a different set of circumstances. Ordinary care is such care as a person of ordinary prudence exercises under the circumstances of the danger to be apprehended. The greater the danger the higher the degree of care required to constitute ordinary care, the absence of which is negligence. It is a question of degree only.

In this case, a one-horse carriage, going at a slow pace, so slow that it could be stopped within a distance of a very few feet, and a heavy electric street car, authorized to go at a speed not faster than nine miles an hour, collided when approaching one another through intersecting streets. The carriage reached the crossing first, and the court holds that it had the right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, it could safely go upon the tracks in advance of the approaching car, the latter being sufficiently distant to be checked, and, if need be, stopped, before it should reach the carriage. When the driver of the carriage approached the intersection of the streets, he was required to do for his own safety and protection what ordinarily careful persons are accustomed to do under like circumstances. The exercise of ordinary care and prudence required him to look and listen for the approaching car before attempting to cross the track, and his failure to do so would be the result of his own thoughtless inattention, and must be regarded as negligence on his part. Whatever the fault of the motorman, it was the duty of the driver of the carriage to have looked both ways and to have listened before attempting to cross the track, and to have done so immediately before crossing the track. One using a vehicle must use due care no less than a pedestrian, and the same is true of the motorman of an electric car, if each would be free from negligence. The phrase "look and listen," used in the books, is simply synonymous with using one's senses to inform the mind of danger that, being liable to threaten, must be guarded against.

INJURY TO NEWSBOY REMAINING ON CAR AFTER BEING ORDERED OFF WHEN HE COULD HAVE GOT OFF WITH SAFETY—INJURY TO TRESPASSER.

Indianapolis Street Railway Co. v. Hockett (Ind. App.), 64 N. E. Rep. 633. June 24, 1902.

A newsboy over 12 years old got on the running board of an open car while it was standing still. He did this for the purpose of selling a newspaper in accordance with what he claimed was the custom of the company to allow passengers to be supplied with newspapers by boys vending same upon the streets. The conductor was on the back platform, and ordered the boy to get off before the car started. He also ordered him to get off just after the car started, when it had gone 25 or 30 ft., and was moving at the rate of 2 or 3 miles an hour. Then the conductor in going toward the front end of the car, as it was necessary and as it was his duty to do to collect the fares of passengers, went in the direction of the boy, and ordered him off. The boy fell and was injured so that his foot and ankle had to be amputated. The appellate court of Indiana, division No. 2, reverses a judgment rendered in his favor, and orders that the company's motion for judgment on the answers to interrogatories notwithstanding the general verdict be sustained. It says that if it be conceded that the boy was on the car by permission of the company, that permission was withdrawn when he was ordered to get off, when he could have done so with safety, and thereafter remaining on the car he became a trespasser. The law protects a trespasser from willful injury only, and willful injury was not claimed or shown in this case. The special findings affirmatively showed that going in the direction of the boy to collect fares, as above stated, was all that the conductor did that could have influenced his actions. It could not be said as a matter of law to be negligence to order one who was sui juris or legally capable of acting in a matter in his own right and not a passenger to get off a car when that order might have been complied with with safety. Admitting that it was possible that it might have shown by a pertinent question that the boy did not hear he order of the conductor, such finding would only go to the question of his contributory negligence, and the question remained, did the facts show that the company was guilty of negligence? The judgment, in view of the special findings, could only have been affirmed upon the ground that the company was guilty of negligence in ordering one who was in no sense a passenger, who remained upon the car in violation of an order, to get off, when such person might have obeyed the order with safety, or to hold that the conductor owed it as a duty to the boy to ignore his presence, or in silence to allow him to remain upon the car until he should choose to leave it.

LIABILITY OF TRUSTEE FOR NEGLIGENCE OF MOTORMAN.

O'Toole v. Faulkner (Wash.), 70 Pac. Rep. 58. Sept. 2, 1902.

This was an action for damages for personal injuries alleged to have been sustained through the negligent and careless handling of a street car by a motorman in charge of the same employed by the party sued, the alleged trustee and operator of the street car line. The latter contended that he was simply an agent and was therefore not responsible for the negligent acts of the motorman. Whatever connection he had with the operation of the street car line was under and by virtue of an agreement in writing whereby he acknowledged and declared that he bid for the purchase of the property, plant and franchise and assets of a light and power company at a sale thereof in pursuance of a decree of court as the agent of and in trust of a certain-named committee of bondholders of said company; that the money and bonds paid for said property were the proper money and bonds of said committee; and that in consideration of the terms and one dollar to him paid by the chairman of the commitee, he covenanted, promised and agreed to hold said property as the agent of and in trust for said committee to manage, and administer the same and operate the plant exactly according to the orders and instructions of said committee, and without further or additional compensation than his salary as bookkeeper, and to deed, convey, transfer and relinquish the possession of all and singular said property, plant, franchise and assets of every name and nature to such persons, firms or corporations as might be designated by said committee, immediately upon its written request, signed by its chairman or a majority of the members, without any delay or evasion.

From this agreement the supreme court of Washington thinks that he was in control of the operation of the street car line. It says that it was true that he was in no sense the real owner, as shown by the agreement. The committee was the owner; but his purchase was in trust for the committee, and his agreement was to hold the property in trust for the committee, and to manage and administer the same. He was the legal owner of the property in possession, and was operating it for the benefit of the cestui que trust, or beneficiary. It seems to the court that this constitutes exactly under the law, a trustee. He was operating a public franchise as the legal owner. Street car companies must be operated by some one who is responsible. The committee was not responsible, and the responsibility must rest upon the operator, who is the legal owner of the property. Neither public policy nor the plainest principles of right will permit this responsibility to be evaded. Being the legal owner, and operating the road, he stood in relation of master to the motorman. And it is well settled that a trustee is responsible for tortious or wrongful acts of a servant, while the beneficiary of the trust is not.

LIABILITY FOR EJECTION OF PASSENGER GIVEN WRONG TRANSFER BY MISTAKE.

Lawshe v. Tacoma Railway & Power Co. (Wash.), 70 Pac. Rep. 118. Sept. 15, 1902.

A passenger who requested a transfer to one line was by mistake of the conductor given instead a transfer to another line. Not noticing the mistake, he presented this transfer to the conductor of a car on the line to which he asked for the transfer, but the latter refused to accept it and demanded fare. He declined to pay fare, and was put off the car. Thereafter he brought this action for damages on account of the ejection. The supreme court of Washington says that an examination of the authorities satisfies it that not only is there an irreconcilable conflict in the authorities, but that the weight of authority and the better reason sustain the passenger's right to recover. It is true that the company has right to make regulations governing its traffic; but those regulations are for the benefit of the company, they are to a certain extent technical, and are understood only by the officers of the company and by travelers who are exceedingly familiar with them.

But outside of all authority, the court says it seems to it that in accordance with the general principles of law the party should recover. It is too plain for argument that only the right to sue for the recovery of the fare or portion of the fare received by the company will be totally inadequate, and, through the plain, everyday law governing agency, the company is responsible for the acts of its agent and for his mistakes. This mistake it was the duty of the company to correct. It must necessarily correct it through its agents. It makes no difference, in reason, that the agent who was called upon to correct the mistake was another and different agent from the one who made the mistake. They were both agents of the company, and the act of the first conductor was in effect the act of the second conductor, because the acts of both were the acts of the company; the company having, for its own convenience, intrusted its business to two agents instead of one. The contract was made when the passenger paid the fare, and it was a contract not with any particular agent of the company, but with the company through its agents. The first conductor, who made the mistake, was not the agent of the passenger, but was the agent of the company, and his mistake was, therefore, the mistake of the company. If any other rule prevailed, the result would be that the company would be allowed to deprive the passenger of part of the benefit of his contract on account of the mistake made by the company, and for which he was in no wise to blame, for he had a right to assume that the conductor furnished him with the transportation for which he asked and for which he paid; it being absolutely impracticable for passengers to make technical examination of the transfer slips which they receive. And he ought to have redress for the company's violation of the obligation which it assumed.

EXTRA CARE REQUIRED APPROACHING STREET CROSSINGS IN CROWDED CITIES—RATE OF SPEED—DIM HEADLIGHT—CIRCUMSTANCES MAY EXCUSE FROM LOOKING AND LISTENING.

Chicago City Railway Co. v. Fennimore (Ill.), 64 N. E. Rep. 985. Oct. 25, 1902.

A woman who started at a street corner in Chicago to cross the street diagonally to take a car looked twice for coming cars and after waiting for a cable train to pass on the nearer track started to cross behind it and was struck by the grip car of a train on the farther track. The evidence tended very strongly to show that whatever headlight there was on this grip car was very dim in its character, and insufficient to enable a person at even a short distance ahead of the train to see its approach upon a dark night. The supreme court of Illinois affirms a judgment in the woman's favor.

It is the doctrine of this court, it says, that drivers, gripmen, and motormen of street cars are obliged to exercise a more exacting attention when they approach street crossings in a crowded city, where vehicles and pedestrians may always be expected in front of them. Although no ordinance limiting the speed at which cable cars were allowed to run in the streets of Chicago was introduced, yet in each case it must be a question for the jury to decide whether or not, under the facts and circumstances of that particular case, the speed is or is not a dangerous or unreasonable rate of speed. A railroad company in the running of its trains is always required to use ordinary care and prudence to guard against injury to the persons or property of those who may be rightfully traveling upon the public streets, and this is true whether there is a statutory regulation upon the subject or not.

Where a cable train is running along the street in a city like Chicago on a dark and somewhat foggy night, with a headlight so small and dim as scarcely to be noticeable, or, if noticeable, likely to be mistaken for some other light, the court is not prepared to say that it is error to submit to the jury the question whether the company propelling such train under such circumstances is or is not guilty of negligence. The question did not arise here whether the speed of the car might have been justifiable if the headlight had been in good condition, but with such a headlight as the evidence showed, it would seem to have been the duty of the persons propelling the car to run it at a reduced rate of speed.

The question whether or not it was negligence not to look a third time, after the train on the nearer track had passed, was one for the jury to determine under the instructions of the court. Anticipation of negligence in others is not a duty which the law imposes. In this case the company owed it, as a duty to this woman and to the public generally, to equip its trains with proper headlights. When she started across the street she had the right to assume that it would perform this duty, and had a right to rely upon the belief that no train would approach without a proper headlight. If she saw no headlight, she had a right to assume that no train was approaching. It has been held that the traveler is not at fault in failing to look and listen, if he is misled without his fault. There may be various circumstances which excuse him from stopping to look and listen, and, if the evidence tends to show that there was such an excuse, the existence of it is a matter for the determination of the jury, and to be submitted to them.

STATUTE DEFINING LIABILITY OF RAILROAD COMPANIES APPLICABLE TO STREET RAILROADS—ORDINARY AND REASONBLE CARE DEFINED—WHAT MAY BE PRESUMED AS TO PEDESTRIANS—DUTY TO PERSONS ON OR APPROACHING CROSSINGS—NO RIGHT TO RUN INTO CROWD.

Consumers' Electric Light & Street Railroad Co. v. Pryor (Fla.), 32 So. Rep. 797. Feb. 18, 1902.

The supreme court of Florida says that the act of 1891 defining the liability of railroad companies in certain cases (Rev. St. Append., p. 1008, c. 4071) has been regarded by it, in unwritten opinions, as applicable to street railroads; but it has not been considered as changing the rule of alleging negligence in such cases to the extent of requiring only an allegation of injury or damage by the running of locomotives, cars or other machinery of the defendant company. The statute does not undertake to fix arbitrarily liability for an injury done, but there is a presumption of negligence under it, arising from the injury or damage.

The measure of duty under the act of 1891 is all ordinary and reasonable care and diligence, which means care proportionate to the dangers to be avoided, so that what will constitute the amount or kind of diligence required will vary under different circumstances, as the terms "ordinary" and "reasonable" are relative, and what under some conditions would be ordinary and reasonable diligence might under other conditions amount to even gross negligence. Street cars, regardless of the power by which they are impelled, have no superior rights to other vehicles or pedestrians at regular street crossings, in the absence of a specific legislative grant, but their rights are equal and in common, and impose correlative duties on the respective parties.

The employes of a street car company in operating cars have the right to presume that a pedestrian will exercise ordinary and reasonable care to avoid injury from moving cars, and they are not required to stop a car until it becomes evident to a person of ordinary and reasonable care and prudence that the pedestrian has failed in his duty, and has placed or is about to place himself in a perilous situation. The duty, however, devolves upon the employes to keep a vigilant lookout for persons on or approaching the track, especially at street crossings, and, when they are discovered to be in danger or going into danger on the track, to use every effort consistent with the safety of passengers to avoid injuring such persons. Where the employes could have seen by the exercise of ordinary care a crowd of people coming out of a church and crossing the track at a regular crossing, while the car was at least 200 feet away, it was their duty to see the crowd of people in a situation of danger, by approaching and going across the track in front of the car at a regular street crossing, and it then became the duty of the employes to use every effort consistent with the safety of passengers to avoid injuring the crowd of people. Conceding that the car could have approached the crossing under the assumption that the crowd would leave the track, still the presence of human beings thereon, and the apparent situation of danger to them, imposed upon the agents of the company the duty to so approach the crowd as to avoid injury, if possible—even to the stopping of the car if necessary. The company has no right, of course, to run into a crowd of people, though they disregard their duty and do not leave the track.

LIABILITY OF RAILROAD FOR INJURY TO CONDUCTOR GETTING ON CAR WITHOUT LOOKING AGAIN AFTER SIGNALING IT TO ADVANCE AT CROSSING.

Doud v. Delaware, Susquehanna & Schuylkill Railroad Co. (Pa.), 52 Atl. Rep. 249. June 4, 1902.

This action was brought to recover damages for injuries which a conductor on a street car sustained by a locomotive running into same just as he had got upon the car, after he had, according to his testimony, gone over to the railroad track, looked and listened, and neither hearing or seeing an engine, it being a wet, foggy, dark night, signaled the car to come forward. The supreme court of Pennsylvania affirms a judgment in his favor, against the railroad company, on the opinion of the court below, which held that the evidence did not present a case of contributory negligence on his part in attempting to cross the railroad company's tracks, so clear and unmistakable that, notwithstanding the verdict of the jury in his favor, the court must so pronounce it as a matter of law, and enter judgment for the company. The court below said that, after a thorough review of the testimony, it was satisfied that whether the conductor was negligent in attempting the crossing, under all the circumstances, was a question of fact for the jury. He had a right to assume that due notice would be given of the approach of the engine by whistle and bell, and, if necessity required the engine to run backwards, that a sufficient light would be displayed to warn him of its coming. While great responsibility rested upon him, as upon his care and vigilance depended the lives of forty or more passengers, still the court thought he was not so plainly chargeable with negligence as he would have been had he been a pedestrian, with his own safety alone to look out for, and no car to engage his attention. There could be no doubt that he would have saved himself had he turned and looked just before taking hold of his car and mounting the step. Was he bound to do this, or be charged with negligence? The court did not think so. He had a right to assume that the railroad company would do its duty, and give him notice of the approach of a train in time for him to make the crossing in safety with his car, if he had before the warning signaled his motorman to come ahead, which signal was being promptly obeyed, and the car on its way across the tracks. If, therefore, he had the right to assume that his car loaded with passengers would get across in safety, he could not be charged with negligence in attempting to cross upon it without again looking up the track for an approaching engine. At the same time, the court said that it was not unmindful of the fact that the highest degree of care devolved upon the conductor when he approached the crossing, as upon his watchfulness depended the lives of a car full of passengers, and it intimated that, under the testimony, the jury would have been justified in finding him negligent, though it did not think the case was so clear that the doctrine of legal presumption be invoked to prevent his recovery.

CITY CANNOT COMPEL REMOVAL OF HEAVIER RAILS LAID WITHOUT PERMISSION ON TRACK HAVING LIGHTER ONES THAN THOSE ON THE OTHER—CONDITIONS AS TO PAVING AND REPAIRS ABROGATED BY MASSACHUSETTS ACT OF 1898—NATURE OF LOCATION.

City of Springfield v. Springfield Street Railway Co. (Mass.), 64 N. E. Rep. 577. July 15, 1902.

A grant of a location for the extension of tracks was conditioned, among other things, that all materials used and all the details of the construction of the tracks, should be to the acceptance of the supervisors of highways and bridges, who, under the city ordinances, had general supervision of all public highways, streets, avenues, and bridges of the city. The tracks were constructed in accordance with the terms of the grant, T-rails being used, which were approved by the board of supervisors. Subsequently, on account of the rails used on one track being of somewhat greater depth and weight than those used on the other track, the company took up the lighter rails, and laid some of the same type, size and weight as the others, these being rendered necessary to provide for the safety and comfort of the public, in consequence of increased travel. In making the change it expended a large sum of money and dug up a portion of the surface of the street, but restored it to the same condition in which it was before the change. It did not apply for or obtain permission from the board of supervistors to dig up the surface of the street or substitute the new rails, but the omission to do so was accidental and without any purpose to evade or violate the law, and, for aught that appeared, the city authorities stood by and saw the work go on without objection. Under these circumstances, the supreme judicial court of Massachusetts holds that the city was not entitled to have the rails removed. It says that the only reason urged why the company should be compelled to take up the rails because it did not obtain the permission of the supervisors was that, for the purpose of improving the avenue, the supervisors intended to harden its surface, and to require a grooved rail to be laid when the old rails were removed. But this does not seem to it to be an adequate reason. It says that if it assumes that the supervisors could have required a grooved rail to be laid, it is nevertheless of the opinion that, under the circumstances shown, the city was not entitled to an injunction compelling the removal of the rails that were laid.

Chapter 578 of the Statutes of 1898, which was intended to commute into money payments to cities and towns the burdens imposed upon street railways in regard to the care of streets, the court holds abrogates conditions in other than grants of original or first location with regard to paving and keeping in repair the surface material of streets. It holds this constitutional, because, for one thing, it seems to it that the locations given to street railway companies in public streets by cities and towns in Massachusetts do not constitute contracts, or, if they do, that they are of such a nature that the legislature can modify or annul them without thereby violating the constitutional provosions. Except over private premises, they are, it seems to it, in the nature of a privilege or permit to use the public ways given by cities and towns by virtue of authority from the legislature for the purpose of facilitating public travel and accommodation. They are analogous to licenses given to run omnibuses along certain routes, though, of course, to make the analogy complete, the omnibuses would have to be built so as to run on rails laid in the streets. They convey no exclusive rights in the highways or streets in which they are granted, but are to be used in common with others having occasion to use the public ways. The public authorities retain, in the main, full control over the streets or ways in which they exist, and may revoke the location, or alter or discontinue the ways, without liability to damages therefor, and subject only to such limitations, if any, as the legislature may see fit to impose.

CANNOT TAKE PART OF LOCATION CONSENTED TO AND REJECT BALANCE.

Collins v. Amsterdam Street Railroad Co. (N. Y. Sup.), 78 N. Y. Supp. 470. Nov. 12, 1902.

Where the consent of the local authorities and of the property owners was secured to the building of a street railroad over about five miles of highway, the third appellate division of the supreme court of New York holds that the company could not take part, as for example 3,100 feet, and reject the balance, building the balance of its line for such entire distance through private lands.

ABUTTER WITH NO TITLE TO LAND UNDER HIGHWAY CANNOT ENJOIN CONSTRUCTION OF STREET RAILWAY THEREIN OR RECOVER DAMAGES THEREFOR.

Kennedy v. Mineola, Hempstead & Freeport Traction Co. (N. Y. Sup.), 78 N. Y. Supp. 937. Dec. 2, 1902.

An owner of land fronting upon a highway, but who does not own any of the fee of the highway, that is, does not have any title to land under the highway, the second appellate division of the supreme court of New York holds, is not entitled to an injunction restraining the construction therein of a street surface railroad authorized by the state, or to recover damages therefor.

INJURY TO PEDESTRIAN ATTEMPTING TO ESCAPE FROM AUTOMOBILE.

Chattanooga Electric Railway Co. v. Cooper (Tenn.), 70 S. W. Rep. 72. Oct. 23, 1902.

A very old man, in crossing a street, suddenly found himself in a position of apparent peril from a rapidly approaching automobile, and, in attempting to escape, in a moment of alarm and excitement, inadvertently ran upon a street railway track, and was killed by a passing electric car. It was contended that it was error to apply the rule that a person put in a place of sudden peril by the negligent act of another, who, losing self-possession, takes the wrong step, and is injured, will not have such step imputed to him as contributory negligence. But the supreme court of Tennessee holds that it is a mistake to assume that the application of this rule is restricted to cases where the peril producing the confusion of judgment, and the consequent false effort to escape, is the negligent act of the party creating the peril. However, to get the benefit of this extension of the rule, the party injured must be without fault in putting himself in the place of peril or danger; that is, he must not recklessly or improvidently have incurred it.

ASSAULT BY MOTORMAN OFF CAR AFTER TERMINATION OF PASSAGE—PROVOCATION TO ASSAULT MITIGATES DAMAGES.

Palmer v. Winston-Salem Railway & Electric Co. (N. C.), 42 S. E. Rep. 604. Nov. 11, 1902.

Arrived at his destination, a somewhat intoxicated passenger, who had used grossly insulting words to the motorman, got out, deposited his bundles on the sidewalk, returned to the car, again got into an altercation with the motorman, then turned, and left the car, whereupon the motorman followed him up, and, two or three steps from the car, struck him on the back of the head with the lever which controlled the car, knocking him down. The fact that the party invited the assault by insulting language or provoking conduct, the supreme court of North Carolina holds, would not bar recovery in a civil action, the provocation being a mitigation, not a defense. If he had been a passenger or his passage had not been fully terminated, or if, when he left the car at his destination, the employe had immediately followed him and assaulted him, the company, the court says, conceded that there would be no question as to its liability. But to render it liable, the court holds, (1) he must have been a passenger at the time he was stricken, or still within the sphere of its protection; or (2) the employe must have been acting at the time within the scope of his employment on its car. A judgment against the company. New trial.

ACT AUTHORIZING TAKING OF PART OF ROAD BY ANOTHER COMPANY UNCONSTITUTIONAL.

Petition of Philadelphia, Morton & Swarthmore Street Railway Co. (Pa.), 53 Atl. Rep. 191. Oct. 13, 1902.

The supreme court of Pennsylvania says that it is in no doubt as to just what power the legislature intended to confer by section 14 of the act of 1889, with its amendment in the act of 1895. It was a clear grant of a right to a younger to enter upon the easement of an older company, and take possession of 2,500 feet of its tracks, poles, and wires, thereafter to use them for its corporate purposes. It was not material that this possession was not to be exclusive. In whatever light it was viewed, it was an authority to appropriate to a certain extent the franchise and property of the older company. The effect, the only effect, of this fourteenth section and the amendment was to transfer the property of one private corporation to a new one for the same public use, both being transporters of passengers for profit. This was unconstitutional. That a company owed its corporate existence to the act of 1889 did not prevent it denying the constitutionality of section 14 with its amendment, the section, both in its purpose and effect, being a distinct legislative enactment, so that if it be completely eliminated, all the other provisions stand in full force.

CARE REQUIRED WITH REFERENCE TO LEDGE OR EMBANKMENT IN HIGHWAY OR ON OWN LAND—WITH REFERENCE TO THE EQUIPMENT AND MANAGEMENT OF CARS AND THE CONSTRUCTION OF TRACKS.

Galligan v. Old Colony Street Railway Co. (Mass.), 65 N. E. Rep. 48. Oct. 30, 1902.

Where tracks were within the bounds of a highway, though not in that part used for common travel, but in a cut or depression excavated for them through a ledge, the supreme judicial court of Massachusetts says that, in one sense, the ledge, being a part of the highway not within the tracks, and more than 18 inches distant from that part of the highway which they occupied, was not within the company's care. Still, its right under its location included that of maintaining and operating its road, and carried with it the right so to deal with the ledge or bank that the fall of material from it should not obstruct or endanger the running of cars upon the track. The court sees no reason why the company was not bound, as to its passengers, to exercise the same degree of care to prevent injury to them in consequence of the rolling of stones from the embankment upon the track that it would have been bound to use if the place had not been part of the highway, and had been part of a location upon the company's own land, or of one taken from private owners by the exercise of the right of eminent domain under a grant of power from the legislature. This degree of care is the same as that required with reference to the equipment and management of the cars or the construction of its tracks. It is the highest degree of care consistent with the nature of the undertaking, which is the management or operation of the road as a common carrier of passengers; or, in other words, the requirement is reasonable care according to the nature of the contract.

VIOLATION OF STATUTE OR ORDINANCE REGULATING SPEED EVIDENCE OF NEGLIGENCE—EXPERT EVIDENCE ADMISSIBLE TO SHOW SPACE IN WHICH CAR MAY BE STOPPED.

Norfolk Railway & Light Co. v. Corletto (Va.), 41 S. E. Rep. 740. June 12, 1902.

Statutes regulating the speed of railroad trains at certain places being regulations clearly intended for the protection of travelers, it is well settled, the supmere court of appeals of Virginia says, that any violation of them is competent evidence of negligence in an action brought by a traveler on the highway, even though the statute simply imposes a penalty for its violation. Statutes and valid municipal ordinances regulating the speed of trains or street cars stand upon the same footing. The fact that the ordinance here in question was passed after the company was given the right to operate its cars upon the streets of the city did not render it any less binding upon the company. Even direct legislative authority to a street railway company to use the streets of a city does not exempt it from reasonable municipal or police control, and it is subject to such ordinances to the same extent as natural persons.

The court also says that it is clearly of the opinion that expert evidence is admissible to show within what space a street car running under given conditions may be stopped. This is a subject not within the range of common experience and observation, but involves technical and peculiar knowledge, as to which expert evidence is admissible.

FAILURE TO CALL PASSENGERS OR OTHERS AS WITNESSES.

Yula v. New York & Queens County Railroad Co. (N. Y. Sup.), 78 N. Y. Supp. 770. Oct., 1902.

The conductor testified that he took the names of passengers on the car at the time of the accident for witnesses; but none of them was called as a witness. Counsel for the plaintiff argued to the jury that it was the duty of the company to call them, and that the presumption of law was that if called their testimony would be against the company. The court charged the jury that the company was under no duty to call them; that there was no such presumption, and that the case had to be decided on the evidence produced, and without regard to the failure of the company to call such passengers; and this was excepted to. A motion for a new trial is denied by the supreme court of New York, trial term, Queens County. It says that it is aware of no rule creating such a presumption against a party, or even permitting the testimony he presents to be looked upon less favorably, for his failure to call other persons as witnesses, except in the case of witnesses in the employ of the party, or in some other way so related to or associated with him that the law presumes that they would be favorably disposed to him if called; and in such case it must be made to appear that such persons were witnesses of the occurrence in order that the presumption may arise at all. Passengers on a car do not come in such category in respect of either party in cases like this. Prudence dictates to each party to get their names, if possible, but failure to call them as witnesses amounts to nothing.

WHAT THE LAW MEANS BY EQUAL RIGHTS AT STREET INTERSECTIONS AND HAVING CARS UNDER CONTROL—$10,885.62 FOR INJURIES.

Sesselmann v. Metropolitan Street Railway Co. (N. Y. Sup.), 78 N. Y. Supp. 482. Nov. 14, 1902.

In this case, where it affirms a judgment for $10,885.62 for damages for personal injuries sustained by a mason 45 years of age, who had one of his hands practically ruined for the purposes of his trade and had suffered much pain, the second appellate division of the supreme court of New York says that the accident occurred at a street intersection where the rights of the plaintiff and defendant were equal; at a point where he had the right to assume that it would have its car under control, and would, as the operator of a powerful engine of destruction, be vigilant in protecting or preserving the equality of rights on the part of pedestrians and others lawfully using the highway. When the law declares that the rights of parties are equal at a given point, it does not mean that the more powerful of the two may disregard the approach of the weaker, and gain and pass the point without any regard for the latter. It means that each, having regard for the rights of the other, considering the dangers to be anticipated from a disregard of the mutual rights of the parties, may make use of the highway in a lawful manner; and this necessarily devolves upon the defendant, in the operation of its cars at street intersections, the duty of having them under control. It is not enough that the speed shall be reduced, if that reduction of speed does not operate to give the motorman that control of his car which is necessary to the equal rights of pedestrians and others at street intersections, and it is always a question for the jury whether the car is in such control.

INJURY TO PERSON RUNNING TO TAKE CAR AND FROM STUMBLING FALLING UPON TRACK—NO ABSOLUTE DUTY TO STOP CAR ON SIGNAL OF INTENDED PASSENGER.

Winchell v. St. Paul City Railway Co. (Minn.), 90 N. W. Rep. 1050. June 20, 1902.

Plaintiff signaled the motorman in charge of one of defendant's street cars of his wish to take passage thereon, then started on a moderate run towards the track and the point where the car would come to a stop. When within about six feet of the same, he stumbled by reason of some obstacle in the street, and fell upon the track, and was struck by the car and injured. The supreme court of Minnesota holds that the evidence was insufficient to support a finding of actionable negligence on the part of the company,—that the motorman was not bound to anticipate the possibility that the party might fall upon the track, and was not guilty of negligence in not having his car under such control that he could stop the same in time to avoid such an accident. Conceding that the car was being operated at an excessive rate of speed, the court says that it is clear to it that the proximate cause of the accident was the party's own involuntary act in stumbling and falling upon the track; that his injuries were the result of an accident, for which neither party was in any way responsible; and to sustain a recovery would be to establish a precedent which could not possibly be followed in the future.

The court is not aware of any rule, it says, making it the absolute duty of a street car company to stop its cars upon the signal of a person wishing to take passage thereon. It is usual and customary, no doubt, to do so, but it cannot be said to be an absolute duty. It is a matter of common knowledge that frequently, where cars are already overloaded with passengers, the motorman takes no notice of persons signaling an intention or desire to take passage, and passes them without any effort to come to a stop. The plaintiff had no right, so far as the record disclosed, to rely upon the motorman to bring his car to a stop upon this occasion. The motorman knew from the signal that he did not intend to cross the track. There was no occasion for him to do so. Nor could it be said that the motorman was bound to guard against the possibility of an accident of this kind, if it be conceded that it was his duty to stop the car at the party's signal. He was not required, in the operation of his car, to anticipate that possibly the party might stumble and fall upon the track, and to have his car so under control as to avoid a collision in such event.

RIGHT OF CONDUCTOR TO REFUSE TO RECEIVE MORE PASSENGERS—DUTY TO WARN THOSE WANTING TO BOARD CAR WHEN IT STOPS—WHAT ONE SIGNALING BY STANDING BY TRACK MAY ASSUME WHEN CAR STOPS—SUFFICIENCY OF WARNING—STARTING CAR.

Maxey v. Metropolitan Street Railway Co. (Mo. App.), 68 S. W. Rep. 1063. June 9, 1902.

A street car company, the court of appeals at Kansas City, Mo., says, may become liable to a party seeking to become a passenger, even though it did not stop to take on passengers. The court concedes that the car may stop to let off a passenger, and be justified in refusing to take on others, for some sufficient reason,—such as being already sufficiently filled, or, perhaps, being behind regular time, and another car closely following, and the like. Yet while the company has this right, a person desiring to get on, who goes out into the street and signals (as by standing by the track) at a place where the car stops for passengers, is justified in assuming that the stop then and there made is in response to his signal, or for the double purpose of letting passengers off and taking him on, and the company's servants, being presumed to have ordinary sense, will be charged with a knowledge of such assumption of the person desiring to get on; and if, for any reason, it is not desired to receive such person as a passenger, it is the duty of the proper servant to warn him if he attempts to get on the car. So, therefore, it can make no difference, up to the time when the person is made aware that more passengers are not desired, whether the car, in point of fact, stopped for the sole purpose of letting a passenger off.

We have already seen, the court says further on, that in certain situations—such as a car fully loaded—the conductor has a right to refuse to receive more passengers, and therefore to warn those seeking passage to keep off. It is therefore clear that, if the conductor warned plaintiff in a tone of voice loud enough for her to hear, he was not guilty of negligence, even though she did not hear, unless he saw that she did not heed him, and was in such position as that his starting up was reasonably certain to injure her. It was error to make the conduct of the conductor, as to care or negligence, depend upon whether plaintiff heard him. His act should not be characterized by the degree of plaintiff's hearing or attention. If he gave the warning in a voice sufficiently loud to arrest the attention of an ordinary person, he, in that particular respect, was not guilty of negligence. And if he signaled for starting the car without discovering that she had disregarded his warning and had put herself in a hazardous position, he should not be held to have been negligent.

CROSSING OF STEAM RAILROAD TRACKS IN STREET—WHO TO BEAR EXPENSE OF CONSTRUCTING AND MAINTAINING CROSSING—STREET RAILWAY NO ADDITIONAL BURDEN—AUTHORITY OF ENGINEER OF STEAM ROAD WITH REGARD TO REPAIRS—STEAM ROAD MUST SUPPLY SAFETY GATES.

Central Passenger Railway Co. v. Philadelphia, Wilmington & Baltimore Railroad Co. (Md.), 52 Atl. Rep. 752. June 19, 1902.

The adjudged cases, the court of appeals of Maryland says, are quite in accord in holding that, when a new road or way is constructed across an old road or way, the owner of the new way must not only bear the expense of making and keeping in repair the new way, including the cost of such structural changes in the old way as are rendered necessary by the construction of the crossing, but he must, in addition, make compensation to the owner of the old way for the property or easement appropriated for the occupancy of the new way. And this doctrine, as below explained, the court holds, is applicable where one railway track crosses another railway track on the bed of a city street, to which street neither railway company has any other right than the permission given by the municipality to lay tracks thereon.

It is indisputably true, the court says, that a railway or a railroad company which, under authority obtained from the city, lays its tracks along or across an opened and subsisting city street, acquires thereby no exclusive right to the use of the street; but it does not thence follow that it secures no rights of any kind which another company subsequently seeking to use the same track, or a part of the same track, is bound to recognize. There may well be no exclusive right in the company to the use of the street as against the public generally, or as against a parallel or competing road, and yet there may be, and certainly is, a right in the company to use its own tracks upon the street, and to use them to the exclusion of any other company, unless the other company procures the right to use those tracks upon making due compensation. This is true not only with reference to a longitudinal use of the tracks, but also concerning the bisecting of a track at right angles, and its use in that way.

There are two elements of damage in the ordinary crossing of an established way by a new way, and these are: First, the cost of the construction and of the maintenance of the new way, including structural changes in the old way made necessary by the building of the new way; and, secondly, the value of the easement or property belonging to the owner of the old way, and which may be impaired or appropriated by the new way. Both of these must be paid by the person who constructs the new way. In cases such as this one, where a railway crosses a railroad in the bed of a city street, the second of these two elements of damage does not exist, because when a steam railroad is located on a street the company takes its rights subject to the rights of the public to use the street in a reasonable and lawful manner, and since the street railway is not an additional burden to the street, but simply such a use as the public are entitled to have made of the street, the steam railroad takes its right in the street subject to the right of the street railway company to lay its tracks across the former's tracks, and the steam railroad is not entitled to recover any compensation for such crossing as for an additional burden.

The common-law doctrine that whatever structures are necessary for the crossing of an old way by a new way must be erected and maintained at the expense of the party under whose authority and direction the crossing is made is applicable to railways and railroads which intersect each other upon the public streets of a city, unless that doctrine be modified by statute. Outside of statutory provisions there is neither precedent nor authority for requiring the owner of the subsisting way to contribute any part of the expense rendered necessary to enable the owner of the new way to cross the old way. The crossing of the old way is made for the benefit of the second comer, and not for the benefit of the owner of the old way; and, even, though both occupants claim under licenses from the same municipality, common justice dictates that the one for whose exclusive benefit the crossing is made should defray the expense of constructing it. And as the continuance of the crossing is as much for his benefit as was the construction of it in the first instance, it is equally obvious that he should maintain it wholly at his own cost.

Moreover, the court holds that there is included in the proposition just stated the following corollary, viz.: That the engineer of the railroad company shall have the right to say when and in what manner and to what extent repairs or renewals shall be made, and, that if they are not made by the street railway company, they may be constructed at its expense by the steam railroad company. As it is the duty of the street railway company to keep the crossing in repair, so that it may be used not only by itself, but by the steam road, whose tracks the crossing in some measure interrupts, and as the steam road requires more durable and substantial construction than a street railway needs, it is altogether reasonable and proper that the decision of the questions as to when, in what manner, and to what extent the repairs ought to be made should be left to the engineer of the steam railroad company.

Nothing said in this judgment is to be understood, however, as justifying the demand made by the steam railroad company that the street railway company must pay one-half of the cost of safety gates or other similar appliances required under an exercise of the police power for the protection of the public at the crossing. Such appliances it is the duty of the steam railroad company to supply.

INJURY TO PASSENGER AFTER ALIGHTING BY CATCHING FOOT IN ROPE ATTACHED TO CAR BY SOME BOY.

La Fond v. Detroit Citizens' Street Railway Co. (Mich.), 92 N. W. Rep. 99. Nov. 11, 1902.

As a passenger alighted from a car and passed around it her foot caught in a rope that was dragging, and she was seriously injured. The testimony abundantly proved that some boy who was in the habit of hitching sleds or cans or something of the sort—at least, that was the natural and necessary inference from the testimony—had left that rope there. Bear in mind, too, the supreme court of Michigan says, to what part of the car the rope was attached. It was not attached above, but below, the projection, which was practically level with the platform. Moreover, it was some time after dark. Of course, the only way a rope of this sort could be discovered would be by close examination. None of the men on the back of the car saw it until some one was struck by it, except the one who passed around it when he alighted. From the testimony of one witness, who alighted about 7½ minutes before the accident occurred, one would be justified in inferring that the rope had been on from that time. But that it was the custom not to permit boys to hitch on cars, was the only inference that could be drawn from the testimony with regard thereto. The circuit judge was of the opinion that no actionable negligence was shown, and directed a verdict for the company. And in this opinion the supreme court concurs. That on one occasion a rope had been found attached to another car of the company's, and was cut off, the court says was a circumstance so unusual that it could not be held that its occurrence entailed upon the company the duty of providing for a special and continuous inspection to prevent a repetition of such a trespass. The conductor of this car was not shown to have had any knowledge of it, nor to have had any reason to expect that such a rope had been left dangling in the rear of this car.

ORDINANCE AUTHORIZING A ROADBED ABOVE GRADE SUBJECT TO REPEAL—TRACKS TAKEN IN BY EXTENSION OF CITY LIMITS MAY BE ORDERED REMOVED TO CENTER OF STREET AND PLACED AT GRADE—GROUND OCCUPIED MAY BE REQUIRED TO BE PAVED—CONSTRUCTION PRESUMED TO BE INTENDED.

Snouffer v. Cedar Rapids & Marion City Railway Co. (Ia.), 92 N. W. Rep. 79. Oct. 28, 1902.

If it be assumed for the purposes of argument that a city ordinance was a reasonable and valid exercise of municipal authority, and constituted a contract between the city and the railway company, which ordinance provided for two parallel paved roadways of 25 feet each, separated by a 20-foot strip carrying the railway tracks and ballasted with stone to a height which would render crossing the same with carriages impracticable except at street intersections, the supreme court of Iowa says that it was still competent for the city to repeal or modify the privilege granted, whenever, in the exercise of a reasonable discretion, it should find that the convenience and safety of the public or the proper improvement of the street required it.

With reference to a legislative grant of authority to construct and maintain a street railway, the court says that, while authorizing the use of the highway for this purpose, it thinks it must be held that such use was subject to the reserved power of the state by itself or by its local municipality to enact all reasonable measures to protect the general public in the use of the street for the primary purposes for which streets and highways are established. When, therefore, by the extension of the city limits, a portion of the street railway was brought within the jurisdiction of municipal authority, it was neither more nor less than a street railway occupying a city street, and amenable to municipal regulation, like all other instrumentalities of its kind.

Again, the court says that it needs no argument to demonstrate that the side or margin of the highway may be the most natural and convenient location of a street railway in a rural neighborhood, but it is even a plainer proposition that when, by increase of population, the city expands, and the rural highway becomes a city street, lined on either hand with residences or places of business, a track so located and used for the frequent passage of swiftly moving cars may become an intolerable inconvenience and source of peril, especially to those upon the immediate front of whose property it operates. And the court declares that it has no hesitancy in holding that the remedying of such condition by requiring the track to be removed to the middle of the street is a reasonable regulation, which the city may enforce.

There is nothing unreasonable, the court further says, in requiring the company to put its tracks at grade, and to pave the ground that it occupies in the street wherever such paving is duly ordered. The statute contemplates it. Code, sections 834, 835. Such construction gives the general public unrestricted access to and use of the entire street from curb to curb, subject to the right of the company to the proper use of its track. With rare exceptions, it is the universal plan adopted wherever street railway systems exist. In the absence of express qualification, it is the kind of construction which the law presumes to be intended.

VALIDITY OF CITY ORDINANCE REQUIRING COMPANIES TO REMOVE ALL DIRT AND SNOW FROM BETWEEN THE TWO OUTERMOST RAILS OF THEIR TRACKS.

City of Chicago v. Chicago Union Traction Co. (Ill.), 65 N. E. Rep. 243. Oct 25, 1902. Rehearing denied Dec. 3, 1902.

Section 1716 of the Revised Code of Ordinances of the City of

Chicago provides: "The several street railway companies at any time operating railroad tracks on and along the surface of any of the streets, avenues or alleys of the city of Chicago are hereby, respectively, required to remove all dirt, snow and other accumulations from so much of the surface of each street, avenue or alley now or hereafter containing any of their railway tracks, as lies between the two outermost rails of such tracks, and also from such additional surface, in width, as may be prescribed in any ordinance relating to or affecting any such street, avenue or alley, and shall, respectively, clean such portions of said street, avenue or alley and remove entirely from and out of such street, avenue or alley all such dirt, snow and accumulations at least once in each week, and as much oftener as the commissioner of public works shall, in writing, direct; such dirt, snow and accumulations to be removed and disposed of in accordance with the ordinances of the city relative to the removal of street cleanings, and subject to the rules and regulations of the department of public works in that behalf." Section 1717 reads: "Any street railway company operating a street railway upon or along the surface of any street, avenue or alley in the city of Chicago which shall refuse or neglect to clean any part of a street, avenue or alley, as required by the last preceding section hereof, shall, upon conviction thereof, be fined in a sum not less than $50 nor more than $200 for each and every case of such refusal or neglect."

This ordinance, the supreme court of Illinois holds, is a reasonable and valid exercise of the police power, and that it should be obeyed and enforced accordingly. It says, among other things, that the permission or license given the company to use the street did not operate to deprive the city of the general power or control over the street delegated to the municipality by the general assembly of the state. The city, as the representative of the state, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety, and comfort of the people. The exercise of this power affects the public, and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the ordinance granting the license to lay the tracks and operate the street railway in the street, deprive itself of this power or relieve itself of this duty; nor could the company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety, or comfort of the people.

DEMANDING SECOND FARE OF PERSON ASKING FOR A CERTAIN CAR AND BOARDING IT BEFORE IT REACHES ITS TERMINUS—SIGN ON CAR NOT TO BE TAKEN AS SHOWING WHICH WAY IT IS GOING—SHOW OF RESISTANCE AUTHORIZING USE OF FORCE IN EJECTION.

McGarry v. Holyoke Street Railway Co. (Mass.), 65 N. E. Rep. 45. Oct. 29, 1902.

The story of the party suing was that he hailed a car, in the city of Holyoke, near the city hall, when it was going in the direction of the postoffice, and asked the conductor whether it was a Mountain Park car. On being told that it was, he got on the car, paid the fare demanded, and rode to the terminus of the road at the postoffice, where the car stopped. After it had gone about as far as the city hall on the return trip, another fare was demanded. The supreme judicial court of Massachusetts is of the opinion that the party was wrong in refusing to pay the second fare. It says that the conductor might have thought that he took the car on its trip from the park to the city to make sure of a seat on its return trip to the park, or that he asked the question to identify the route on which the car was then proceeding. But it was not for the conductor to speculate as to his purpose in taking the car. He asked a plain question, and the conductor gave a correct answer. He did not ask whether the car was going to Mountain Park. Nor was there anything in his contention that he was justified in thinking that the car was on its way to the park, and refusing to pay his fare, because it had on it the sign "Mountain Park," and he had noticed that on other cars run by the company the sign was changed when the cars were running in different directions, and always had a sign exposed to indicate the terminus they were bound for. The company was not bound to adopt the same system on all its cars.

If the plaintiff made the conductor understand that he would resist being put off, that the conductor was justified in using force in putting him off, especially after again telling him, and for the third time, that he must pay his fare or get off. If the conductor had to use force to put him off, and he resisted, the mere fact that he landed on his head was not sufficient to warrant a finding that undue force was used. Furthermore, the court says that it would have been better if the car had actually stopped before the conductor put his hands on him; but it apparently deems sufficient the man's admissions that it had then "almost stopped," and "by the time he had me off the car, I guess the car was stopped."

RIGHT TO ERECT AND MAINTAIN POLES AND WIRES NOT TRANSFERABLE FROM ROAD.

City of Carthage v. Carthage Light Co. (Mo. App.), 70 S. W. Rep. 936. Dec. 1, 1902.

The right, conferred by a franchise ordinance, to erect and maintain poles and wires in the streets and alleys of a city incidental to and in connection with the operation of an electric street railway, the court of appeals at Kansas City, Mo., holds, cannot be disconnected with the operation of said street railway and transferred to one who does not own the said street railway franchise nor operate the same under it.

ORDINANCE IMPOSING DUTIES ON MOTORMEN BINDING ON COMPANY.

Gulf, Colorado & Santa Fe Railway Co. and Rapid Transit Railway Co. v. Holt (Tex. Civ. App.), 70 S. W. Rep. 591. Nov. 8, 1902. Rehearing denied Nov. 29, 1902.

A city ordinance prescribing a course of conduct to be pursued by motormen in the operation of cars, as for example requiring them to stop their cars and ring their gongs at a distance of five feet from the intersection of any street railway or steam railway track, the civil court of appeals of Texas holds, is as binding on the company as though the ordinance specially named the company therein.

FRANCHISE ACQUIRED PRIOR TO VESTING OF RIGHT OF ACTUAL CONSTRUCTION UNDER STATUTE.

Commonwealth v. Uwchland Street Railway Co. (Pa.), 53 Atl. Rep. 513. Oct. 13, 1902.

The Pennsylvania railway act of June 7, 1901, gives to any company incorporated under it authority to adopt extensions, and, as requisite to the establishment of an extension, exacts no more of such company than that its resolution to extend over a route described shall be recorded in the appropriate recorder's office, and that an exemplification of this record shall be filed in the office of the secretary of the comonwealth, though "no right to actually construct the same [the extension] shall vest until after thirty days from the filing of said exemplification." A charter was issued to a company June 10, 1901. On June 26, 1901, an exemplification for an extension was filed in the office of the secretary of the commonwealth. On July 10, 1901, another company took out a charter to construct its railway on a route including two of the same streets already taken by the first-mentioned company. The supreme court of Pennsylvania holds that the charter of the second company was invalid, the act further providing that whenever a charter should be granted to build a road, no other charter to build a road on the same streets, highways, bridges or property, should be granted to any other company. The view apparently taken is that it is only the "right to actually construct" the extension which is deferred for thirty days after the date of filing the exemplification, the company having done everything required of it to establish an extension being immediately invested with a franchise, with an exclusive privilege in the streets covered by the extension.

LIABILITY FOR INJURY TO PASSENGER JUMPING OR PULLED OFF CAR OR JUMPED UPON, A COLLISION OF CARS APPEARING IMMINENT.

Birmingham Railway & Electric Co. v. Butler (Ala.), 33 So. Rep. 33. Nov. 25, 1902.

One of the averments in this case being that the company's agent negligently caused or allowed another car "to appear to be in imminent danger of colliding with" the car on which the plaintiff was a passenger, it was contended that in order to constitute a good cause of action thereunder it should appear from the allegations—First, that the appearance of imminent danger was such as to convince a reasonable person of the imminence of such danger; and, second, that, as the result of such appearance, the plaintiff, in order to save herself, jumped from said car, as any reasonable person might have done under such circumstances, and thereby she was injured. The supreme court of Alabama holds the contention sound.

There was evidence tending to show that the plaintiff was pulled off of the car by the gentleman accompanying her, and also evidence tending to show that another passenger, after she had fallen or been pulled off, jumped or fell upon her. In either event, the supreme court says, if imminent danger and peril from collision of cars existed in fact, or if the appearance of such imminent danger was such as to reasonably impress an ordinarily prudent person of its presence, and the acts above stated followed in efforts of escape or safety, the question of the company's liability in law would be the same. In either case the negligent act of the company would be the proximate cause.

FOREIGN CORPORATION NOT COMPLYING WITH STATE LAW CANNOT MAINTAIN ACTION FOR CONSTRUCTION OF ROAD.

Delaware River Quarry & Construction Co. v. Bethlehem & Nazareth Passenger Railway Co. (Pa.), 53 Atl. Rep. 533. Oct. 13, 1902.

The supreme court of Pennsylvania says that the effect given by its decisions to the act of April 22, 1874, which provides that no foreign corporation shall do any business in that commonwealth until it has complied with certain requirements, is to prohibit a recovery by a foreign corporation on a contract made in violation of the provisions of the statute. And, while it says that isolated transactions between a foreign corporation and citizens of Pennsylvania have been held not to come within the prohibition of the act, it holds that a foreign corporation was within the prohibition when it came into the state with its agents and workmen, and for the period of six months was engaged in the continuous prosecution of its ordinary business, constructing 10 miles of electric railway, employing a large amount, if not all, of its capital, and creating new obligations day by day. Nor was registration two months after the work was completed sufficient to entitle it to maintain an action for labor and materials furnished by it in the construction of such railway.

DUTY AS TO KEEPING TRACKS IN REPAIR—PAVING AND REPAVING—ORDINANCE REQUIRING REPAIR OF PAVEMENT CONFERS NO RIGHT OF ACTION ON INJURED TRAVELER—ORDINANCE NOT SUPPORTED UNDER POLICE POWERS.

Fielders v. North Jersey Street Railway Co. (N. J.), 53 Atl. Rep. 404. Nov. 17, 1902.

It is familiar law, the court of errors and appeals of New Jersey says, that a railway company, having the right to lay tracks in a public street, is bound, by the general principles of the common law, and without a specific statute or ordinance or a contractual obligation, to lay its tracks in a proper manner, and to keep them in a proper state of repair. But the question of the liability of such a company for failing to keep the surface of the street in repair is quite a different question. Such a liability does not result from the mere fact that the corporation has been vested with a franchise or license of using the public street. The liability to maintain the pavement as such, if it exists, must either be rested upon some valid statute or ordinance imposing such a duty, or must arise out of the obligations of a contract.

Where a city ordinance in terms requires all street railway companies to pave, repave, and keep in repair, under the direction and to the satisfaction of the proper municipal authorities, the space between the rails of their tracks, and between the tracks, and the space for one foot outside of each outer track, at the same time providing that, if any company fail so to pave or repave or to keep the pavement in repair, the city authorities may cause the work to be done, and the company shall, on demand, pay the cost thereof, the court holds, as a matter of construction, that the ordinance does not confer a right of action upon any member of the traveling public who may sustain damage through the non-repair of the street.

Such an ordinance as that just described, the court further holds, is an assumption of the power of taxation, and cannot be supported under the police powers conferred upon the municipality by the legislature.

INJURY TO PASSENGER ON RUNNING BOARD BY BEING STRUCK BY GIRDER OF BRIDGE—DUTY TO PASSENGERS—DUTY TO PASSENGER AND EMPLOYES IN CONSTRUCTION OF TRACKS—INSPECTION NOT REQUIRED OF PASSENGERS OR EMPLOYES.

San Antonio Traction Co. v. Bryant (Tex. Civ. App.), 70 S. W. Rep. 1015. Nov. 19, 1902. Rehearing denied Dec. 17, 1902.

A man 60 years of age was received as a passenger on a crowded car near a bridge. The car was put in motion before he could find and secure a seat. He was on the west side when he paid his fare by depositing in a box in front, and the only vacant seat was on that side, in the rear. Not wanting to disturb the lady passengers, whose dress skirts fell across the aisle, he stepped down on the running board, went along it until he reached the seat, and in his endeavor to reach it he was struck by an upright girder; the car having in the meantime attained a speed of from five to six miles an hour. He had for six months previously daily crossed the bridge on the company's cars and testified that he did not know, nor had he observed, the dangerous proximity of the track to the bridge. The court of civil appeals of Texas holds that it could not be said that he was guilty of contributory negligence as a matter of law.

Nothing is more firmly settled, the court says, than the proposition that railway companies are bound to exercise extraordinary diligence in protecting their passengers from injury. The track is just as essential a thing in the transportation of passengers by rail as is the car in which they ride. A railway car cannot be successfully or safely run except upon a track, and a railway company cannot lawfully, either as to car or track, be wanting in extraordinary diligence towards passengers without becoming responsible in law for the consequences. This duty of so constructing and maintaining its track as to not expose its passengers on its cars to danger the passenger above mentioned had the right to presume had been performed by the company in laying its track along said bridge, and, unless he knew that it had failed in such duty, he had the right to act upon such presumption. The degree of care that a common carrier by rail owes to its passengers in protecting them from defective construction of its railroad is higher than it owes to its servants. To the former it owes the utmost care, to the other ordinary care. Neither are required by law to inspect or ascertain whether this duty has been performed. Each may rest upon the assumption that it has been.

INTERCHANGE OF FREIGHT BETWEEN STEAM AND ELECTRIC RAILWAYS.

Stillwater & Mechanicsville Street Railway Co. v. Boston & Maine R. R. (N. Y. Court of Appeals), 171 N. Y. 589; 64 N. E. Rep. 511. June 27, 1902.

Haight, J.: This proceeding was instituted by the Stillwater & Mechanicville Street Railway Co. to obtain an order permitting it to unite and connect the tracks of its railroad with those of the Boston & Maine Railroad Co. in order to facilitate the free interchanging of cars between the two roads.

The Stillwater & Mechanicville Street Railway Co. was organized under the general railroad law of this state (New York), with the right to transport both passengers and freight, and is operated as an electric railroad by the trolley system.

The Boston & Maine Railroad Co. is a foreign corporation, organized under the laws of Massachusetts, and is operating a steam railroad. It is contended upon its behalf that the statute does not authorize the court to compel a connection of the tracks of the two roads. The question, therefore, raised for our review is, as to the proper construction of the statute.

The railroad law of 1890 (chapter 565, section 12) provides as follows: "Every railroad corporation, whose road is or shall be intersected by any new railroad, shall unite with the corporation owning such new railroad in forming the necessary intersections and connections, and grant the requisite facilities therefor; and if the two corporations cannot agree upon the amount of compensation to be made therefor or upon the line or lines, grade or grades, points or manner of such intersections and connections, the same shall be ascertained and determined by commissioners, one of whom must be a practical civil engineer and surveyor, to be appointed by the court, as is provided in the condemnation law; and such commissioners may determine whether the crossing or crossings of any railroad before constructed shall be beneath, at, or above the existing grade of such railroad, and upon the route designated upon the map of the corporation seeking the crossing or otherwise. All railroad corporations whose roads are or shall thereafter be so crossed, intersected or joined, shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch as, and at a rate of freight, not exceeding the local tariff rate charged for similar goods, merchandise and other property, received at and forwarded from the same point for individuals and other corporations."

It will be observed that this statute contains two provisions, one for the crossing of the tracks of another railroad at, above or beneath grade; and the other provides for the intersection of the tracks of such railroads, and upon the making of such connections the roads shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective lines.

The court below seems to have been of the opinion that this statute had reference to steam railroads, and did not pertain to roads operated by electricity. In determining this question it becomes necessary to examine more fully the Railroad Law for the purpose of ascertaining the legislative intent. By referring to section 2 of the act, we find provisions for the incorporation of railroads which is to be accomplished by the execution of a certificate by fifteen or more persons which shall contain the name of the corporation, the number of years it is to continue and the kind of road to be built or operated. The section contains other provisions, among which is subdivision 11, which provides that "if a street surface railroad, the names and description of the streets, avenues and highways in which the road is to be constructed."

It is thus apparent that the articles of incorporation provided for have reference to all kinds of railroads for public use, including steam railroads, street, surface and electric roads.

Again, passing to section 4, subdivision 5, of the act, we find that every railroad corporation, in addition to the power given by the general stock corporation law, shall have power "to cross, intersect, join or unite its railroad with any other railroad before constructed, at any point on its route and upon the ground of such other railroad corporation, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connection."

Section 34. "Every railroad corporation shall start and run its cars for the transportation of passengers and property at regular times, to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all passengers and property which shall be offered for transportation at the place of starting, within a reasonable time previous thereto, and at the junctions of other railroads, and at the usual stopping places established for receiving and discharging way passengers and freight for that train; and shall take, transport and discharge such passengers and property at, from and to, such places, on due payment of the fare or freight legally authorized therefor."

Section 35. "Every railroad corporation whose road, at or near the same place, connects with or is intersected by two or more railroads competing for its business, shall fairly and impartially afford to each of such connecting or intersecting roads equal terms of accommodation, privileges and facilities in the transportation of cars, passengers, baggage and freight over and upon its roads, and over and upon their roads and equal facilities in the interchange and use of passenger, baggage, freight and other cars required to accommodate the business of each road, and in furnishing passage tickets to passengers who may desire to make a continuous trip over any part of its roads and either of such connecting roads. The board of railroad commissioners may, upon application of the corporation owning or operating either of the connecting or intersecting roads, and upon fourteen days' notice to the corporation owning or operating the other road, prescribe such regulations as will secure, in their judgment, the enjoyment of equal privileges, accommodations and facilities to such connecting or intersecting roads as may be required to accommodate the business of each road, and the terms and conditions upon which the same shall be afforded to each road. The decision of the commissioners shall be binding on the parties for two years, and the Supreme Court shall have power to compel the performance thereof by attachment, mandamus, or otherwise."

It will be observed that each of these provisions of the statute, of which reference has been made, expressly refers to every railroad corporation, and thereby includes every railroad incorporated under the provisions of section 2 of the act.

The contention is now made that to compel a track connection with steam railroads by electric, or street surface railroads for the interchanging of traffic, would be a burden and a hardship to steam railroads that was not contemplated when the statute was passed; that to permit connections with steam railroads by the large number of electric railroads which have been, or are being constructed, would result in confusion to the steam railroads and make their operation difficult.

The learned Appellate Division, appears to have been impressed with this argument, for it states in its opinion that the proceeding and purpose is new, and obviously opens a field of inquiry of the greatest importance, not alone to railroad corporations, but to the general public, which has an interest in the streets and highways of towns, villages and cities of the state; that if the street surface railways are to be recognized as an integral part of the great system of steam railroads, that the purpose should be made clear by the legislature. We readily concede that the legislative intent should clearly appear, but we are not much impressed with the contention that burden and hardship will result to the steam railroads, or that confusion will follow in their operation. The provision of the statute authorizing the courts to compel connections or intersections of tracks between railroads, to our minds was intended to promote the public interests, independent of that of the railroad companies. Travelers and the shippers of merchandise and freight have the right to make use of all the facilities provided for in the articles of incorporation, and the provisions of the statute pertaining thereto, in the conduct of their business. This, we think, is made clear by the provisions of the statutes which require that all railroad corporations whose roads are, or shall be intersected shall receive from each other and forward to their destination all goods, merchandise and other property intended for points on their respective roads, with the same dispatch and at the rate of freight not exceeding the local tariff rate, etc. Bearing this purpose in mind, we pass to a consideration of the meaning of the law. As we have seen, by the statute authorizing the incorporation of railroads, the legislature contemplated making provisions for all kinds of railroads, street surface, as well as steam railroads. By section 4, subdivision 7, all roads organized under the provisions of the act were empowered "to take and convey persons and property on its railroad by the power or force of steam, or animals, or by any mechanical power." It is true that the statute contains numerous provisions which apply alone to steam railroads and other provisions which apply alone to electric or street surface roads; but in most of these provisions there is specific reference to either steam or street surface roads. The great body of the statute was intended to apply to all railroads incorporated under its provisions, especially so far as those provisions were applicable. The revision of the Railroad Law of 1850 is of recent date and after the street surface railroads in our cities and villages had become very numerous. The legislature in undertaking a revision of the railroad laws attempted so far as possible to establish a complete system under which all kinds of railroads could be operated and the public interests subserved. In construing these statutes it does not become us to shut our eyes to the purposes sought to be accomplished, or the discoveries that have been made and the improvements accomplished in the transportations of the country in recent years. The great steam roads have extended across the continent from ocean to ocean, and from the far north down to the tropics. These roads have become great arteries over which is transported the greater part of the commerce of the continent. It has not been considered profitable or practical for steam roads to be constructed to every village, hamlet or productive district in the country. This, however, is rapidly being accomplished by the numerous electric roads that are in process of construction, or are contemplated. By their means the farmer, the mill owner and the merchandise vendor in distant places may be able to reach the steam railroads, and through them the great markets of our cities, with their merchandise and products, and in this way one road may become a feeder and distributer of the other.

If one electric road were seeking a connection with another road operated by the same power, it would hardly be claimed that the provisions of section 12 did not apply. It is practically conceded that electric roads may be united with other roads of the same character and operated by the same power. But the statute has not limited the courts to the requiring of intersections and connections between roads of the same character. Very likely, electric roads tendering cars to steam roads for transportation should only offer those properly equipped with brakes and couplers, so that they may be taken and transported readily and safely. It may be that additional regulations will become necessary in order that equal privileges, accommodations and facilities may be afforded in connecting and intersecting roads, but all this may be controlled by the board of railroad commissioners, which, under the provisions of section 35, to which we have referred, is given full authority in the premises.

It is said that the rights of the public in the streets and highways of our cities, towns and villages should be protected and that cars loaded with merchandise and freight should not be permitted to be run over street surface railroads. It may be that additional regulations should be provided either by statute or by ordinance, limiting the time in which cars of this character should be permitted to run over street surface railroads, especially in cities and large villages; but that the power exists to run such cars is no longer an open question in this court.

This question was elaborately considered in the case of DeGrauw v. Long Island Electric Railway Company (43 App. Div. 502), which case was affirmed in this court on the opinion below (163 N. Y. 597).

Again, bearing in mind the legislative purpose, its intent to our minds appears reasonably clear, in the use made of the provision to cross, intersect, join or unite its railroad with any other railroad. The word "cross" is used in connection with the word "connect" and the Legislature could hardly have intended that one word should mean one kind of a railroad, and the other another kind. One of the most important rights which the Legislature undertook to provide for and to protect was that of the right of one railroad to cross the tracks of another which had previously been constructed. Were it not for this, one road running north and south through the state could absolutely prevent the constructing of another extending east and west. The Legislature was careful to make ample provisions for crossings in the same section in which intersections were provided for, and these provisions with reference to crossings have been held to apply to electric and street surface roads crossing steam roads, or of steam roads crossing electric or street surface roads. (Buffalo, B. & L. R. R. Co. v. N. Y., L. E. & W. R. R. Co., 72 Hun, 583; Port Richmond & P. P. El. R. R. Co. v. Staten Island R. T. R. R. Co., 71 Hun, 179; affd., 144 N. Y. 445.)

It appears to us that the Legislature has clearly empowered the court to order connections such as is sought by the petitioner in these proceedings. The order of the Appellate Division should, therefore, be reversed, and that of the Special Term affirmed, with costs.

Parker, C. J., and Gray, O'Brien, Vann Cullen and Werner, JJ., concur.

JUDGMENT IN ACTION AGAINST LESSOR FOR INJURIES BAR TO ACTION AGAINST LESSEE—LESSOR LIABLE FOR NEGLIGENCE OF LESSEE.

Anderson v. West Chicago Street Railroad Co. (Ill.), 65 N. E. Rep. 717. Dec. 16, 1902.

The only question argued by counsel before the supreme court of Illinois was the effect of a judgment in a suit by the plaintiff against the Cicero & Proviso Street Railway Company as an estoppel in this case. The facts, as found by the appellate court, were that the Cicero & Proviso Street Railway Company was the lessor, and the West Chicago Street Railroad Company, was the lessee, of the street railway on which the accident occurred, and that the injury and negligence charged were the same in both suits. The conclusion of the appellate court from these facts was that the lessor and lessee sustained the relation of principal and agent to each other, and that the determination of the suit against the principal was res judicata in the suit against the agent, and a bar to its further prosecution, and that hence an instruction asked by the West Chicago Street Railroad Company to find for it should have been given. The judgment of the appellate court is affirmed by the supreme court.

It is the settled law of this state, the supreme court of Illinois says, that when injury results from the negligent or unlawful operation of a railroad, whether by the corporation to which the franchise is granted or by another corporation or other corporations which the proprietary company authorizes or permits to use its tracks, the company owning the railway tracks, and franchise will also be liable, and for this purpose the company whom it permits to use its tracks, and its servants and employes, will be regarded as the servants and agents of the owner company, and no other negligence than that of the lessee need be alleged or proved to fix the liability of the owner. In other words, in the case of a leasing of a railroad by one company to another company, the negligence or tort of the lessee company in operating its road is by the law of this state imputed to the lessor company, because it cannot absolve itself from the responsibility imposed by law upon it to operate its road so as to do no unnecessary damage to the person or property of others. The relation between them, so far as it has reference to such damage, is not that of landlord and tenant, but that of principal and agent, or master and servant. Both being liable to the party injured, such party could sue them both in the same action, or sue each one separately, but if one was not guilty of the tort the other one could not be.

RISK ASSUMED BY PASSENGER PASSING ALONG RUNNING BOARD ON SIDE NEXT TO PASSING CARS—DUTY OF PASSENGER TO PLACE HIMSELF IN POSITION OF SAFETY—EVIDENCE OF ACTS ON PREVIOUS OCCASIONS, WIDTH OF CARS AND USE OF RAIL ON INSIDE OF NEW ONES EXCLUDED.

Moody v. Springfield Street Railway Co. (Mass.), 65 N. E. Rep. 29. Oct. 30, 1902.

The party suing boarded a car, with some friends, he walking towards the rear end and getting onto the running board, paying his and their fares, and moving along the running board to take a seat with them, in doing which he was struck by a car on the other track, of the approach of which he testified that no warning was given him. Without undertaking to say that in no case would a passenger upon an electric car, who was injured by being struck by a passing car while attempting to pass along the running board, while the car on which he was was in motion, from one part of the car to another, on the side on which cars were liable to pass, be entitled to recover, the supreme judicial court of Massachusetts thinks that in this case there was nothing to justify the party, as matter of law, in so doing, and that he must be held to have assumed the risk, if not to have been wanting in due care. Generally speaking, the court says, it is the duty of a passenger who boards an electric car to place himself in a position of safety. It is not necessarily negligent for him to stand on the platform, and there may be circumstances—such as the crowded condition of the car—which justify him in standing or being upon the running board. But manifestly a position on the running board of a car in motion, on the side on which other cars are liable to pass, is one of danger; and the court thinks that a passenger who boards an electric car in which there are plenty of vacant seats at the place where he boards it, and who chooses, for his own accommodation and pleasure, to pass along the running board, while the car is in motion, to another part of the car, on the side on which other cars are liable to pass, must be held to have assumed the risk of contact with and injury from cars passing on the neighboring track.

Evidence offered by the party that he had been on previous occasions on the running board on the side next to passing cars, and had not been injured, the court holds, was rightly excluded. It had no tendency to show that he did not assume the risk, or that he was in the exercise of due care. Whether he was in the exercise of due care depended not on what he had himself done on previous occasions, but on what persons of ordinary prudence would do under the same circumstances. The court also holds that the exclusion of testimony offered as to the width of the cars did the party suing no harm. It would have had no tendency to show that he did not assume the risk, or that he was in the exercise of due care. Likewise, it holds that testimony in regard to a rail being used upon the inside of some new cars was also rightly excluded. The obvious purpose of it was to prevent passengers from getting onto or off from the car on that side. The fact that it was on the new cars, and not on the old ones, was no proof of negligence on the part of the company.

POWER OF CITY TO PRESCRIBE MAXIMUM RATE OF FARE—OCCUPATION CLASSED WITH THAT OF HACKMEN, OMNIBUS DRIVERS AND CABMEN—VALIDITY OF ORDINANCE REGULATING FARES AND PROVIDING FOR TRANSFERS—POWER TO PROVIDE FOR TRANSFER TICKETS—WAIVER BY LESSORS—COMPANY ORGANIZED TO LEASE ROADS MUST COMPLY WITH OWN CHARTER.

Chicago Union Traction Co. v. City of Chicago (Ill.), 65 N. E. Rep. 451. Oct. 25, 1902. Rehearing denied Dec. 16, 1902.

Has the common council of the city of Chicago the power to prescribe a reasonable maximum rate of fare to be charged for carrying a person from one point to another within the limits of the city of Chicago by a person, firm, or corporation engaged in the business of carrying passengers for hire on street railways? That is the first question taken up by the supreme court of Illinois in this case. It says that under its charter the common council of the city has power to regulate hackmen, omnibus drivers, cabmen, "and all others pursuing like occupations, and to prescribe their compensation." Street railway companies come within the purview and meaning of the words "all others pursuing like occupations," as used in connection with hackmen, omnibus drivers, and cabmen. The occupation of hackmen, omnibus drivers, and cabmen is the carrying of passengers for hire. All of the last-named vehicles are drawn by horses. The acts of 1859 and 1861, under which the company claimed its rights herein, were acts to promote the construction of horse railways, and to authorize the extension of horse railways in the city of Chicago. The ordinances of 1858 and 1859, under which, also, it claimed its rights, were ordinances authorizing the construction, extension, and operation of horse railways in the streets of Chicago. The railways referred to in these acts and ordinances were nothing more than carriages drawn by horses, with the exception that such carriages moved upon fixed iron rails, in a regular track, with wheels, while the other vehicles mentioned go with wheels upon the ordinary street way. The occupation of the traction company is the carrying of passengers for hire, and therefore its occupation is like the occupation of hackmen, omnibus drivers, and cabmen. By the application of the maxim ejusdem generis (of the same kind or nature), which is only an illustration or specific application of the broader maxim noscitur a sociis (it is known from its associates), the rule is deduced that, "when general words follow an enumeration in particular cases, such words apply only to cases of the same kind as those expressly mentioned, or, stated in different language, the word 'other,' following an enumeration of particulars, embraces enumerated particulars of like nature only, unless a broader sense is obviously intended." Here the general words, to wit, "all others pursuing like occupations," follow an enumeration of particular cases, to wit, hackmen, omnibus drivers, and cabmen, and consequently such general words apply to cases of the same kind as those expressly mentioned. Again, the court says that it necessarily follows (from the purport of decisions upon the subject) that those whose business it is to propel street railway cars along the iron tracks laid in the public streets of a city are engaged in the business of carrying passengers for hire, and that their occupation is of a like nature with the occupation of hackmen, omnibus drivers, and cabmen, whose business, also, is the carriage of passengers for hire. The general doctrine is that the legislature has power to regulate the charges of common carriers. The legislature, having such power can confer it upon the common council of the city. In other words, the municipality may exercise the power by delegation from the state.

Therefore, when the legislature gave to the city of Chicago, under its charters, the power to regulate, and prescribe the compensation of street railway companies as carriers of passengers, it gave the city power to pass sections 1723 and 1725 of the Revised Code of Chicago, reading: (Section 1723): "The rate of fare to be charged by any person, firm, company or corporation owning, leasing, running or operating street cars or other vehicles for the conveyance of passengers on any street railway within the limits of the city of Chicago for any distance within the city limits, shall not exceed five cents for each passenger over twelve years of age, and half fare for each passenger over seven and under twelve years of age, for one continuous trip, except when such street cars or other vehicles shall be chartered for a specific purpose. And, at any point where any line of any street railway owned, leased or operated by any person, firm or corporation does now or shall hereafter, within the limits of the city of Chicago, join, connect with, cross, intersect or come within a distance of two hundred feet of any other line of street railway owned, leased or operated by the same person, firm, company or corporation, any passenger who shall have paid his fare on any street car or other vehicles run or operated on such first mentioned line shall, on his request, be entitled to demand and receive from the person or persons in charge of such street car or other vehicle upon which he has so paid his fare, a transfer ticket, which transfer ticket shall entitle such passenger, without further charge, to be carried on any other line adjoining, connecting, crossing and intersecting, as aforesaid, and owned, leased or operated by such person, firm or corporation, for a continuous trip of any distance within the limits of the city of Chicago, if used within one hour after the same is issued at the point or place for which such transfer ticket was issued." (Section 1725): "For each and every violation of the provisions of the two last preceding sections, the person, firm, company or corporation owning, leasing or operating said street cars or other vehicles within said city shall be subject to a penalty of not less than $50.00, nor more than $200.00."

The grant of the power to regulate the occupation, and prescribe the compensation of those pursuing it, is accompanied by a grant of power to pass all such ordinances, rules, and regulations as may be proper or necessary to carry into effect the power so granted. If the common council had the power to fix the maximum rate of fare for any distance at five cents, as was done by said section 1723, it also had the power to provide for transfer tickets in the manner and at the places and within the time named in said section 1723. The requirement as to transfer tickets, transferring the passengers from one line to another of the same company, is a mere incident to the power to fix the maximum rate of fare. The charter of the city gave its common council power to prescribe the compensation of persons pursuing the occupation of operating street railways. The compensation referred to can be none other than the fare to be charged for carrying passengers. The power to fix the rate of fare must necesarily include the power to fix the rate for carrying a passenger over two lines operated by one company, as well as the power to fix the rate for carrying a passenger over one line operated by such company; the question being not as to the reasonableness of the charge, but as to the power to regulate or fix the charge.

The traction company insisted that if section 1723 was enforced against it that it would impair its alleged contract rights, and that therefore the section was in violation of the guaranties of the constitutions of the United States and of the state of Illinois. Its contention was that contracts were made in 1859 and 1861 with the North Chicago City Railway Company and the Chicago West Division Railway Company, and that those contracts had passed by assignment to it, the Chicago Union Traction Company. But the court is of the opinion that, if there were any such contracts as were claimed by the traction company, through assignment to it, the enforcement of section 1723 was not a violation of those contracts. The lessor companies must be held to have waived the terms of the contracts when they executed the leases to the traction company; and the traction company was estopped from insisting upon the operation of the roads in strict accordance with the terms of such contracts, because it would thereby be violating the express requirements of its own charter. The court says, among other things, that the lessor companies by submitting their roads to the operation of the traction company, impliedly agreed that the latter should operate them under its own charter, and in accordance with the provisions of its own charter. It is true, as a general rule, that, where one railroad company leases its property to another, the lessee must conform to the requirements of the charter of the lessor, and be governed by such charter, in operating the road. But this can only be true where the lessee company, in operating the road in accordance with the charter of the lessor, is not violating its own charter. The cases announcing this rule are cases where the lessee road had full power under its charter to operate the road of the lessor in accordance with the terms of the latter's charter, and without conflict with the lessee's charter. There are some cases which hold that a railroad already constructed, and required by law to charge a certain rate of fare, may lease and operate another road, and charge the rate of fare prescribed by the charter of the lessor company, rather than that prescribed by its own charter. But these cases proceed upon the theory that the lessee road obeys its own charter in operating the part of the road constructed by itself, and operates the road leased by it in connection with its own road in accordance with the charter of the lessor road. In this case, however, the traction company, so far as the record showed, never constructed or owned any railroad. Its president testified that it was organized for the express purpose of buying out the North and West Side railroads. It was a corporation whose business was the leasing of railroads, and not the operation of a road leased in connection with another road constructed by it. In its business of leasing and operating leased railroads, it must comply with its own charter; that is to say, it must submit to reasonable regulations by the common council as to its rate of fare.

CAN BE COMPELLED TO EXTEND TRANSFER SYSTEM TO SUBORDINATE LINES USED AS FEEDERS—DUTY OF REAL OR BENEFICIAL OWNER TO GIVE TRANSFERS—PRESUMPTION AS TO COMPANY ORGANIZED TO BUILD AND OPERATE EXTENSION—PRESUMPTION OF REASONABLENESS OF PRESCRIBED FARE — PROFIT ALLOWED — WHAT MUST BE SHOWN TO PROVE RATE UNREASONABLE.

Chicago Union Traction Co. v. City of Chicago (Ill.), 65 N. E. Rep. 470. Oct. 25, 1902. Rehearing denied Dec. 16, 1902.

The principal question considered in this case was whether the Chicago Consolidated Traction Company bore such a relation to the Chicago Union Traction Company as to make the two companies come within the purview and meaning of section 1723 of the Revised Code of Chicago, so far as transfer tickets were concerned. The Chicago Union Traction Company was organized under the general law of the state on May 24, 1899. It was nothing more than a consolidation and union of the West Chicago Street Railroad Company and the North Chicago Street Railroad Company. The

Chicago Consolidated Traction Company was organized under the general incorporation act of the state on January 28, 1899. It was nothing more than a union or consolidation of seven or eight suburban or outlying companies, which were organized as feeders to, or extensions of, the North Chicago Street Railroad Company and the West Chicago Street Railroad Company. As the original companies substantially and in effect owned and operated the outlying companies before the merger of the original companies into the Chicago Union Traction Company, and before the merger of the outlying companies into the Chicago Consolidated Traction Company, so after such mergers the same relation of subordination and control existed on the part of the Chicago Union Traction Company over the Chicago Consolidated Traction Company. Or, as the supreme court of Illinois further says, the history of the development of the railway system here involved showed that the lines of the Chicago Consolidated Traction Company were built by the lessors of the Chicago Union Traction Company, the North Chicago Street Railroad Company, and West Chicago Street Railroad Company, and, if not built directly by such lessor companies, they were built under the superintendence of the latter, and with money raised upon bonds guaranteed by the latter, and as extensions of and feeders to the lines of the latter, and were being operated for that purpose. Under these circumstances, the court holds that the Chicago Consolidated Traction Company bore such a relation to the Chicago Union Traction Company as to make the two companies come within the meaning of section 1723 (set out in full in report of another case bearing same title, and decided same date, credited to 65 N. E. Rep. 451), so far as transfer tickets were concerned.

The requirement, embodied in section 1723, the court says, is imposed upon the street railroad companies therein specified by reason of their public character, and by reason of the fact that they are engaged in a public occupation, which permits them to use the streets and highways of the people. The duty to give the transfer tickets therein required is a duty which arises out of the public character of their business. This duty rests not merely upon the technical owner, but upon the real, beneficial owner, and in this case it could not be doubted that the Chicago Union Traction Company was the beneficial owner. It was well said by one of the counsel for the city in this case: "A corporation could not avoid its duties to give transfers from one line to a connecting line by conveying to another corporation a dry legal title to one of the lines, and it is submitted that it is equally impossible to do so by leaving a dry legal title in the hands of the corporation from which it purchased a connecting line." Where the duty of a public service corporation to the public is to be determined, the substance of things will be looked to, and consideration should not be given to mere corporate fictions.

Where a company is organized to build and operate an extension of a railroad system, such company will be regarded as but the instrument of such system to carry on its business, where the stock is all placed in the names of employes of the old corporation, the principal offices of the new corporation are filled by officers of the old one, the old corporation purchases bonds of the new one to construct its road, and furnishes the rolling stock, a traffic agreement is made, by which the new corporation is to work for the old one for a long period of time, the benefit of which is to pass with the sale or mortgage of the property of the old one, and the operating divisions of the road show a single system of management.

Furthermore, the court is of the opinion that the enforcement of the ordinance under consideration, over the lines of the Chicago Union Traction Company as one system of railway, would not so reduce its earnings or profits as to constitute a taking of its property without due process of law. It says, among other things, that the rate of fare prescribed in section 1723 would be presumed to be reasonable until its unreasonableness was shown, and the burden of showing the rate to be unreasonable rested upon the Chicago Union Traction Company. A railroad company is not entitled to exact such charges for transportation as will enable it at all times not only to pay operating expenses, but to meet the interest regularly accruing upon all its outstanding obligations, and justify a dividend upon all its stock. A public service corporation is entitled, at the very most, only to a profit on the actual investment. If the original cost of the roads of the suburban companies be compared with their present value, the Consolidated Company, if it was to be considered as a separate company, had made a large profit, instead of a loss. But if, as this opinion holds, the Chicago Consolidated Traction Company was merely a part of the Chicago Union Traction Company, and owned and operated by the latter company, then it was necessary to show the profits and earnings of the whole system of railways embraced within the Chicago Union Traction Company, and the effect of the enforcement of the ordinance upon all the lines embraced within the whole system. Evidence of the earnings or expenses of a single mile or division of a system of railways is inadmissible to prove that a rate fixed by legislation is unreasonable.

The Chicago Union Traction Company should have introduced proof as to the earnings of its entire line, including its original lessor companies as well as the Consolidated Company, so that such earnings of the entire line might be estimated as against all the legitimate expenses of such entire line.

LIABILITY FOR INJURY TO FEELINGS AND SENSIBILITIES OF PASSENGER BY WRONGFUL EXPULSION FROM CAR.

Mabry v. City Electric Railway Co. (Ga.), 42 S. E. Rep. 1025. Dec. 10, 1902.

A street railway company, the supreme court of Georgia holds, is liable in damages for an injury to the feelings and sensibilities of a passenger, caused by his wrongful expulsion from one of its cars, though such passenger may not have received any physical injury thereby.

JURISDICTION TO DETERMINE SUBMITTED QUESTION OF MODE OF CROSSING AT GRADE.

Jersey City, Hoboken & Paterson Street Railway Co. v. New York, Susquehanna & Western Railway Co. (N. J. Ch.), 53 Atl. Rep. 709. Dec. 21, 1902.

The court of chancery of New Jersey holds that when two railways, as for example a street railway and a steam railway, cross each other at grade, and, being unable to agree upon proper provisions for protection against collision, submit that question to its determination, it has jurisdiction to determine it. Furthermore, the court refers to it as a familiar principle that, where two carriers have a right of common easement in a place, the mode of its use may be determined by it.

DUTY TO CONSTRUCT LINES NOTWITHSTANDING PROVISO AS TO PRIOR GRADING OF STREETS AND AFTER NINE YEARS.

State v. Duluth Street Railway Co. (Minn.), 92 N. W. Rep. 516. Dec. 26, 1902.

A village ordinance required a street railway company, in consideration of the franchise thereby granted, to build lines of railway upon certain streets on or before a day certain. "Provided that the streets on which the same passes shall have been graded 60 days prior thereto." The supreme court of Minnesota holds that the proviso was inserted for the benefit of the railway company, and it was not released from its obligation by the mere fact that such streets were not graded within the time stated. It holds further, that the village, or its successor, was not guilty of laches (or inexcusable delay in asserting a right) in not requiring the construction of the lines until nine years after the passage of the ordinance.

CARE REQUIRED FOR SAFETY OF PASSENGERS AND DUTY TO GIVE THEM AN OPPORTUNITY TO ALIGHT AFTER CAR STOPS—NOT BOUND TO KNOW WITHOUT NOTICE THAT ANY ONE WILL ATTEMPT OR IS IN ACT OF GETTING OFF WHILE CAR IS IN MOTION.

Ashtabula Rapid Transit Co. v. Holmes (Ohio), 65 N. E. Rep. 877. Nov. 18, 1902.

The law exacts of carriers of passengers, the supreme court of Ohio holds, a high degree of care for the safety of passengers, according to the circumstances, and this duty ordinarily continues until the passenger is discharged; but it is not required that the carrier shall keep a lookout to prevent passengers from jumping off from running trains, nor that it shall, at its peril, "see and ascertain" that a passenger is about to leave a moving car, without having given any notice, express or implied, of an intention to do so.

If a street car comes to a full stop for any purpose, and a passenger is in the act of alighting, it is negligence for the conductor to start the car before such passenger has had a reasonable opportunity to get off safely. But if the car does not stop, merely slacking speed sufficiently to permit a passenger to get on, the conductor, in the absence of notice of a passenger's intention to alight, is not bound to know that any passenger will attempt to get off, or is in the act of getting off, while the car is in motion.

DUTY WHERE ROAD IS BUILT THROUGH ANOTHER'S LAND AND IN PRIVATE STREET.

Bolster v. Ithaca Street Railway Co. (N. Y. Sup.), 79 N. Y. Supp. 597. Jan. 14, 1903.

Where a street railway company constructed its tracks upon the grounds of the campus of a university, in or crossing a street which was under the exclusive care and control of the university, and the company was, by contract with the university, so in occupancy of such street, with at least a joint duty with the university to keep the same in good repair, the third appellate division of the supreme court of New York holds that from this occupancy sprang a duty of reasonable care to those lawfully upon the premises upon the implied invitation of the university, the duty being imposed by the mere fact of occupancy.

LESSEE OF ROAD SUBJECT TO DEBTS NOT LIABLE FOR ACCRUED LICENSE FEES.

City of New York v. Third Avenue Railroad Co. (N. Y. Sup.), 79 N. Y. Supp. 431. Dec. 19, 1902.

Where one street railway company leases its property to another "subject to all debts and liabilities," and the lessee company agrees that "it shall and will pay, satisfy, and discharge all municipal, county, state, or government taxes and assessments, license fees, or other charges of any description whatever, which, during the term hereby granted, may be imposed upon the property hereby demised, or any part thereof," and the lessor company is not dissolved or merged with the lessee company, but is an existing corporation, liable for its debts and obligations, the first appellate division of the supreme court of New York holds that, while there can be no doubt but that the lessee company will be liable for all license fees accruing to the city after the execution and delivery of the lease, it is not liable for license fees accruing prior to its execution, so that an action can be maintained against it therefor.

PROHIBITED SOUNDING OF GONG IN HEARING OF JURY.

Bronk v. Binghamton Railroad Co. (N. Y. Sup.), 79 N. Y. Supp. 577. Jan. 14, 1903.

One of the questions litigated on the trial of this case was as to the ringing of the gong on the car as it approached the plaintiff from the rear, and as to whether or not the ringing was loud enough to be a sufficient warning to him as he was driving along in a noisy wagon with a coal chute and two shovels rattling in the bottom of the wagon box. During the trial the defendant had brought into the courtroom a gong or bell attached to a box so constructed that from one touch the bell would be rung by continued vibrations of the clapper for a considerable time. It was brought there for the purpose of offering it in evidence, but the defendant's witness could not identify it as the one which was on the car at the time of the accident, and it was not received. While being examined about the bell, the court prohibited the witness from sounding the gong. Notwithstanding this, at a recess of the court it was rung by an officer of the defendant and by one of its counsel in the presence of most, if not all, of the jurors. The bell looked like a new bell, and differed from those in ordinary use in Binghamton on electric street cars. Its construction and location in the courtroom were such as to make a sort of sounding board of the platform where it stood and of the walls of the courtroom, so when it was rung there on this occasion it made a very loud and sonorous sound. The third appellate division of the supreme court of New York holds that, on account of this ringing of the bell, a verdict in favor of the defendant was properly set aside and a new trial granted, even though the jury were instructed to entirely disregard the sounding of the bell, and affidavits were made by seven of them that they obeyed the instruction of the court in this respect.

STEPPING OFF FROM MOVING CAR—RISK OF INJURY ASSUMED.

Jones v. Canal & Claiborne Railroad Co. (La.), 33 So. Rep. 200. Dec. 15, 1902.

It is a matter of common observation, the supreme court of Louisiana says, that persons do every day get on and off from street cars while they are in motion under circumstances that would not, in the estimation of a reasonable man, be considered negligence. When, therefore, a person attempts to step off from a car that is barely moving, his attempt will not, of itself, constitute such negligence as will prevent his recovery for an injury caused by a sudden jerk of the car which throws him to the ground. But, while it may now be considered settled that it is not negligence, as a matter of law, to step off from a moving street car, a person stepping off from such car takes upon himself, in the absence of negligence or fault on part of the carrier, the risk of injury. And if there be no negligence on part of the carrier, there can be no recovery, although the act of the plaintiff may not have been negligent.

IMPLIED AUTHORITY TO ACQUIRE ELECTRICITY TO OPERATE STREET RAILWAYS AND VALIDITY OF SUBCONTRACT BY CITY TO FURNISH SAME.

Riverside & Arlington Railway Co. v. City of Riverside (U. S. C. C., Cal.), 118 Fed. Rep. 736. Nov. 1, 1902.

A grant of power to construct and operate "street railways," the United States circuit court, in California, holds, implies authority, as on the part of a city, to acquire electricity therefor. Nor is ownership of a roadbed, cars and other appliances, of a street railway a condition precedent to the exercise of the implied authority, but a contract, engaging electricity for that purpose, is good upon its face. And where the acquisition, construction, maintenance, and operation of street railways are among the declared purposes of a city's organization, a subcontract by the city to furnish a street railway company a certain amount of electrical power, with which to operate its street railway, the power furnished being at the date of the contract surplus power not required by users of light or power other than the street railway company, the court holds to be within the scope of the city's powers, and that its obligations cannot be terminated or changed by any subsequent increase in the demand for electrical lighting.

NEGLIGENCE IN JERKING OR MOVING CAR WHILE PASSENGERS ARE ALIGHTING.

Skelton v. St. Paul City Railway Co. (Minn.), 92 N. W. Rep. 960. Jan. 9, 1903.

Where a street car stops for passengers to alight, and the servants in charge invite them to leave, such servants, the supreme court of Minnesota holds, have no right to jerk or move the car while such invitation is being acted upon, and it is negligence to do so.

DERAILMENT FROM COLLISION WITH OBSTACLE—NO CONTRIBUTORY NEGLIGENCE ON PART OF PASSENGER SEATED IN CAR.

Ramson v. Metropolitan Street Railway Co. (N. Y. Sup.), 79 N. Y. Supp. 588. Jan. 9, 1903.

The defendant's negligence was predicated upon the fact that the open horse car in which the plaintiff was riding suddenly and violently left the track and tilted to one side, throwing her to the floor, and causing her injuries. This fact, together with evidence that the track at the place was being changed to electric service, that cobble stones were removed, that sand was piled along the track, a trench dug, and barrels of gravel were present, and that a barrel of gravel was the obstacle encountered by the car, causing it to be thrown from the track, the first appellate division of the supreme court of New York holds, justified the inference that the driver was negligent in his failure to observe due care in the operation of the car. The mere fact of derailment was not sufficient; but this, together with evidence as to cause, from which the inference might be drawn that the defendant's act or negligence produced it, was sufficient to present a question for the jury upon the subject of the defendant's liability.

The question of the plaintiff's contributory negligence did not arise, the court holds, it being conceded that she was seated as a passenger in the car when the accident happened.

INSULTING AND THREATENING OF PASSENGER BY EMPLOYE—PERSON CARRIED BY STREET STILL A PASSENGER—$100 DAMAGES.

San Antonio Traction Co. v. Crawford (Tex. Civ. App.), 71 S. W. Rep. 306. Dec. 10, 1902. Rehearing denied Jan. 7, 1903.

The evidence showed, the court of civil appeals of Texas says, that the party by whom this action was brought was a passenger on the street car, and was carried past her destination against her will, and afterwards she was not only addressed in an insulting manner, but had an iron bar or key shaken in her face by an employe of the company. The proposition could not be entertained for a moment that an employe of a common carrier could thus insult and threaten a passenger, and that the law would give no redress for such conduct. It would be a perversion of law and justice to hold that an employe of a common carrier could shake his finger and a piece of iron in a woman's face, because she wished to be put down on the street to which her contract entitled her to be carried, and that, because she was not actually struck in the face, she could not recover damages. Nor was there, the court holds, any merit in the contention that, the moment the car had carried her past her street, she lost her character of passenger. The implied contract with the street car company was to carry her to that street and permit her to leave the car, and she was a passenger on the car until that duty was fulfilled. The amount assessed by the jury, $100, was not too much to pay for such an utter disregard of private rights.

INJURY TO WOMAN FROM FALLING INTO TRENCH AFTER ALIGHTING FROM CAR—ONE HAVING ALIGHTED NO LONGER A PASSENGER.

Lee v. Boston Elevated Railway Co. (Mass.), 65 N. E. Rep. 822. Jan. 8, 1903.

A woman stepped from a car upon a pile of earth about the height of the step of the car, extending from the step of the car some distance towards the sidewalk, on the right-hand side of the street. She noticed the pile before she got off, and she thought it was solid. If she had gone to the sidewalk upon the right-hand side of the street, she would have met with no injury. Instead of taking that course, she took a step towards the trench between the pile and the left-hand side of the street, and, the earth giving way, she fell into the trench. It was agreed that the work of digging the trench was being done by the authority and consent and under the general supervision of the commissioner of highways of the city, and the excavation was made for the purpose of laying down a new track, and that in order to lay the track it was necessary to cast upon the surface the earth taken from the excavation. Such a method of working upon the street, the supreme judicial court of Massachusetts says, is very common. It could not be said either that it was negligent so far as respected the woman, under the circumstances, for the company to permit the pile of earth to remain upon the street, or that there was any duty resting upon the company to direct her to take the safe course plainly indicated to her by the situation, and to cross to the right side of the street. The company had no reason to expect that a person of mature age would be in any danger in alighting from the car at that place in the daytime. Having alighted from the car she was no longer a passenger.

DAMAGES FOR BREACH OF WARRANTY OF ENGINE BOUGHT TO DRIVE ELECTRIC GENERATOR.

People's Savings Bank v. Waterloo & Cedar Falls Rapid Transit Co. (Ia.), 92 N. W. Rep, 691. Dec. 19, 1902.

An engine was bought for the purpose of driving an electric generator which supplied the power for the operation of an urban and interurban line of railway, and this purpose was known to the seller. There was also a full warranty of the engine as to power, control, regularity of work, steam economy and general efficiency. But the evidence conclusively demonstrated that the engine wholly failed to work as warranted. The company asked a recovery, among other things, for loss sustained by reason of its inability to transport passengers over its line, occasioned by the failure of the engine to do the work for which it was purchased and installed. The evidence offered in support of this claim was based largely upon the earnings of the company in transporting passengers to a summer resort or park in previous years. The supreme court of Iowa holds that such estimated loss of profits could not be recovered. It says that the public is at times capricious. Sometimes it travels, and sometimes it does not, depending upon too many conditions to make it at all certain that it will continue to follow the same line of pleasure year after year; and the profits to be derived from transporting it are too speculative and uncertain to furnish a safe rule for compensation in damages. There was evidence proving that passengers who had boarded cars for transportation were compelled to leave them before they had reached their destination on account of failure of power to run the cars, and, had the loss ensuing from such conditions been shown, the court thinks it would be just to allow it. Furthermore, the court concludes that there should be a recovery for excessive use of coal, extra labor, and injury to the generator.

CONDEMNATION BY NATURAL PERSON IN INTEREST OF CORPORATION—NO TWO DIFFERENT RULES AS TO ALLOWANCES FOR BENEFITS.

Beveridge v. Lewis (Cal.), 70 Pac. Rep. 1083. Nov. 18, 1902.

The plaintiff, a natural person, commenced this action to condemn a strip of land through premises owned by the defendant for a right of way for a railroad. It was averred in the complaint that the board of supervisors of the county had granted to the plaintiff a franchise to construct and maintain an electric railway therein. The defendant offered evidence to show that the plaintiff was seeking to condemn the right of way solely for the purpose of transferring the same at once to a company which was engaged in building the railway, and which would own and operate it. The supreme court of California holds that the evidence was relevant, material, and competent.

The court says that this evidence was offered for the purpose of showing that the real party in interest was a corporation, with a view of enhancing the damage, as it was claimed that, if the corporation was the real party in interest, benefits could not be set off against the damage to the land not taken, while perhaps, if a natural person was in charge of the use, and was seeking to acquire such right of way, such benefits might be allowed as a credit. But the point cut much deeper than that. If the court were convinced that the facts were as contended, the plaintiff should not be allowed to maintain the proceeding at all. It is admitted on all sides, and necessarily, that the proceeding can be maintained only by one who is in charge of a public use, and who intends to perform the public service; and, further, if the proceedings may be in the name of an agent, or other representative, such agency should be stated. One who seeks a right of way to sell, merely, is not in charge of a public use.

Bearing on the suggested disadvantage of a private corporation as plaintiff, the court says suppose two cases: Land belonging to one person is being taken by a natural person, and other land belonging to him by a corporation, the uses and burdens being in all respects similar. Can the law provide that in one case an allowance shall be made for supposed benefits and not in the other? The court thinks it must be answered that the legislature cannot provide for the one case a less favorable rule than the constitution has provided for the other. They are entitled to the equal protection of the law, or "the protection of equal laws."

LIABILITY FOR INJURY TO PASSENGER ON SLIPPERY STEP OF SHORT-RUN CAR.

Foster v. Old Colony Street Railway Co. (Mass.), 65 N. E. Rep. 795, Jan. 6, 1903.

The plaintiff took a car which ran from a depot to the business center of the city. She put in evidence that when about to alight from the car she took hold of the handle of the dasher with her right hand, and stepped onto the step with her left foot; as she raised her right foot and threw her weight on her left foot, that foot went out from under her, by reason of the slippery condition of the step, caused by snow and ice which had accumulated upon it. The company contended that it was not practicable for a street railway company to prevent the open steps of its cars from becoming slippery during the continuance of such a storm as there was at that time, either by shoveling off the snow, sleet, or ice which must accumulate on the steps, or by spreading sand or sawdust on them. But under the special circumstances of this case, the supreme judicial court of Massachusetts does not think that this question arose. It appeared that the route over which this car ran was a short one, apparently about five minutes each way; at the time of the accident in question, to wit, a quarter before 10 in the morning, or thereabouts, the car was on its fifth trip. It further appeared that the car had waited at the railroad station 15 minutes, if not more. In addition to this, the motorman testified that by the rules it was the duty of the conductor, in case of storm, to sprinkle sand on the platform and step of the car, and that this could be done every two or three minutes, if necessary; and the conductor testified that he had sprinkled sand on the step where the plaintiff fell three times on the morning in question, and before the accident; and, lastly, that there was a sand pail at each end of the car. On this evidence, the court holds, the jury were warranted in finding that under the circumstances of this case the company could have prevented, and had undertaken to prevent, the open steps of this car from being slippery when the plaintiff alighted from it. For these reasons, the presiding judge was right in not directing a verdict for the company. Furthermore, the court thinks that the foregoing evidence, coupled with the testimony of the conductor that he put "about a quart" of sand on the step at about half past 9 o'clock, while the car was waiting at the railroad station, and the testimony of the plaintiff's witnesses that there was no sand on the step when the accident happened, and that there was no sand pail on the platform, was evidence on which the jury were warranted in finding that the company was negligent. In answer to the question, "So you got off without looking at the steps?" the woman testified, "I knew I had to look out for myself, because it was slippery, and I had hold of this handle"—meaning the handle of the dasher of the car. The court holds that the jury were warranted in finding that she knew that the step was slippery, and did all that due care demanded with that knowledge.

INJURY TO LINEMAN IN REMOVING SPINDLE USED TO PULL OUT TROLLEY WIRE—GIVING OF ORDERS NOT ALONE ENOUGH TO MAKE SUPERINTENDENT.

Mulligan v. McCaffrey (Mass.), 65 N. E. Rep. 831. Jan. 8, 1903.

An experienced lineman was injured in connection with the operation of pulling out a trolley wire to its proper position above the track. A spindle of iron had been inserted by the lineman by an alleged superintendent's direction in the outer end of the horizontal arm of the bracket, so as to get the necessary purchase for pulling out the wire. The lineman was on a ladder which leaned against and was supported by the wire. But, instead of placing the ladder against the wire as nearly upright as could be safely done, in order to relieve the strain on the wire and bracket as much as possible, when the spindle was to be removed, he permitted the ladder to remain at the inclination at which it was left by the pulling out of the wire, and then mounted to the top, which projected above the wire, and towards the end of the arm, and leaned over to take hold of the spindle and pull it out by pulling it away from him; thus subjecting the bracket to a strain which there was no reason to suppose it was constructed to withstand, and making, as one of the witnesses testified, a calculation as to what the strain "on the whole thing" was, impossible. The result was that the bracket broke, and the lineman was thrown to the ground. The supreme judicial court of Massachusetts says that it would seem that hardly any method could have been adopted of pulling out the spindle which would have subjected the bracket at the points where it was attached to the pole to greater strain, and it holds that the lineman was not in the exercise of due care in doing what he did.

The alleged superintendent above referred to was one of a gang of four engaged in the common work of digging holes, setting poles, putting on brackets, and stringing wires. He received the same wages as the other linemen, and on the day of the accident and immediately before had been doing the same work that the lineman who was injured was doing, and at the place of the accident assisted in pulling out the wire and fastening it to the arm. He gave directions and orders both when their employer was there and when he was not. But in giving such orders and directions he acted, it seems to the court, as a workman whose experience qualified him to give them, and not as one whose sole or principal duty was that of superintendence. It was manifest, the court thinks, that he was there principally as a workman, but by virtue of his greater experience he acted also as foreman of the small gang to which he belonged, and gave such directions as the nature of the work required. This, the court holds, was far from making his sole or principal duty that of superintendence.

Wherefore, the court holds that the evidence did not warrant a verdict for the injured lineman.

STRICT COMPLIANCE WITH STATUTE REQUIRED IN DISPOSING OF FRANCHISE—EFFECT OF FRAUDULENT BID.

Pacific Electric Co. v. City of Los Angeles (U. S. C. C., Cal.), 118 Fed. Rep. 746. Nov. 1, 1902.

In determining whether or not a city council, in its proceedings for the disposition of a street railway franchise, lawfully complied with the requirements of the statute, the United States circuit court, in California, holds that the rule that mode is the measure of power and aside from the designated mode there is no power should be carefully observed. The statute providing that "Every franchise * * * to construct or operate street railroads * * * shall be granted upon the conditions in this act provided, and not otherwise," the court says that it should also be borne that negative words in a statute show an intent to make its provisions imperative, and require strict performance, both as to time and manner. And where the statute provided for the opening of sealed bids; an opportunity for further competition by new bids of not less than ten per cent above the highest before each; striking off of the franchise to the highest bidder; allowance of 24 hours to the successful bidder to deposit the amount of his bid; and, in case of such bidder failing to make the deposit, grant of the franchise to the next highest bidder therefor, the court holds that when the highest bidder failed to deposit the amount of his bid as required, it was the duty of the council to grant the franchise to the next highest bidder, unless there was some sufficient reason for a refusal. Assuming that the next highest bid was fraudulent, the council ought not to have granted the franchise to said bidder. When it refused to do so, however; its power in the premises was exhausted, the statute making no provision for any subsequent proceeding. The only way the franchise could be lawfully granted, after its refusal to the next highest bidder, would be under and pursuant to a new advertisement.

OBLIGATIONS OF MERGED COMPANY—LESSEE LIABLE ONLY FOR LICENSE FEE FOR CARS USED.

City of New York v. Sixth Avenue Railroad Co. (N. Y. Sup.), 79. N. Y. Supp. 319. Dec. 19, 1902.

Where there was a merger of one street railroad company with another the first appellate division of the supreme court of New York says that, while the corporate existence of the former was retained so far as it affected existing creditors at the time of the merger, as to all future transactions it became extinct by the merger, and all its obligations were assumed by and imposed upon the corporation that took its place, and it could after its merger create no new obligations, or be liable for acts of the corporation into which it had been merged; and the fact that there were obligations incurred after the merger could not create an obligation of the company that had lost its corporate identity in consequence of the merger.

By an agreement contained in a grant to a company "each passenger car to be used on said road" was to be licensed, and for such license there was to be paid annually such sum as the common council should thereafter determine. It was therefore, the court says, the cars to be used in operating the road for which a license was to be obtained. There was imposed upon the incorporators no obligation, except for each car that was used in the operation of the railroad, and the only liability that the railroad incurred was a license fee for the cars so used. If the railroad company used no cars, it was under no obligation to obtain a license, and was not liable for the fees required therefor. When, therefore, the railroad company ceased to operate its road, leasing its road and franchise to another company, it ceased to operate its road, and ceased to use cars for that purpose. The obligation upon it to obtain a license for the cars used by its lessee, or to pay a license fee therefor, was no longer applicable to it. The lessee company, having assumed the obligations imposed upon the lessor by its charter, was bound to perform such obligations.

NEGLIGENT STARTING OF CAR BY CONDUCTOR AFTER HIS CHARGE THEREOF HAS BEEN TERMINATED BY CHANGE OF CREWS—TEST OF LIABILITY FOR NEGLIGENT ACT OF EMPLOYE.

Lima Railway Co. v. Little (Ohio), 65 N. E. Rep. 861. Nov. 18, 1902.

While a woman was attempting to board a street car at a transfer station, having placed one foot on the lower step, the bell of the car was rung, and the car was suddenly started, throwing her to the street. The car was No. 36, and had come to the station only a minute or two before, in charge of one Cordrey as conductor and one O'Malley as motorman. It was Cordrey who rang the bell, though the evidence tended to show that it was the rule and custom of the street railway company, at that time and place, to change conductors and motormen on that car, and further tended to show that at the time the accident occurred such change of crew had actually taken place, and that Cordrey had then been relieved and gone off duty as conductor, although he had not yet left the car; that he had gone inside of the car, having left his place on the platform, which was taken by one McGuff, while one Smalley was the motorman. It was suggested that the jury be instructed: "* * * If, at the time plaintiff undertook to get on the car, McGuff, as conductor, and Smalley, as motorman, had absolute charge of the car No. 36, and so continued up and until the accident occurred, the company would not be responsible for the act of Cordrey, former conductor, if his trip and duties had ended upon the stoppage of the car No. 36 at its arrival at the transfer station in the center of the square at a time prior to the injury." The supreme court of Ohio holds that this was a proper instruction, and should have been given.

While the rule is well established that the master will not be exempt from liability merely because the act of a servant was in disregard of a rule laid down by the master, or was in disobedience of his express command, yet, on the other hand it is equally well settled, the court says, that, to make the master responsible for the act of a servant or employe, such act must be done by such servant or employe while engaged in the service and duties of his employment, and in the prosecution of his master's business. The fact that Cordrey worked daily for the company, and was, in a popular sense, its employe, could not operate to make the railway company liable at all times and under all circumstances for his negligent conduct. If, as assumed by the instruction requested, at the time the accident occurred, McGuff was then the conductor in absolute charge and control of said car, and Cordrey's trip and duties as conductor thereon had ended, then and in that event Cordrey, having no longer any duty to perform in or about that car, and it being no longer any part of his duty under his employment to be or remain on said car, his act (the ringing of the bell as a signal to start) was an unauthorized assumption of authority, not within the line of his duty or the scope of his employment, and the railway company would not be responsible therefor.

Whether the person (Cordrey) whose immediate negligence or misconduct caused the particular injury complained of was, at the time, the servant of and was then acting for the railway company sought to be charged, the court holds, was a question of fact to be submitted to the jury under proper instructions from the court. The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether such act was done by the servant while engaged in the service of and while acting for the master in the prosecution of the master's business. A master is not liable for the negligent act of a servant or employe if, at the time of the doing of such act, the servant or employe is not then engaged in the service or duties of his employment, although the act be one which, if done by such servant or employe while on duty and at a time when actually engaged in his master's service, would be clearly within the course and scope of the usual and ordinary duties of such servant or employe.

LOCATION OF INTERURBAN RAILWAY BY LEGISLATURE CANNOT BE CHANGED FOR LOCAL ACCOMMODATION.

Attorney General v. Derry & Pelham Electric Railway Co. (N. H.), 53 Atl. Rep. 443. Oct. 25, 1902.

The company was authorized by a special act of the legislature to construct a street railway from Derry Depot to the Massachusetts line, over such highways and lands as "may be necessary for the public accommodation," in the towns of Derry, Londonderry, Windham and Pelham, said railway to be "laid out by the selectmen of said towns in like manner as highways are laid." The supreme court of New Hampshire says that the legislature decided conclusively that the public good required a street railway extending through the four towns mentioned, when it granted the company's charter, and neither the selectment of the towns nor the company could overrule or extend that authoritative and fundamental finding of the public needs by laying out the railway over lands not fairly included within the general route prescribed by the charter. The general purpose of the legislature must first be ascertained, and applied to the application for a definite location, before the question arose whether the public accommodation or convenience required a particular location, and that question was to be determined by a consideration of the general utility of the road, or the legislative purpose in authorizing its construction, rather than by the demands of local convenience in the particular town. In other words, the "public accommodation" which was made a test of the location of the road through the town related primarily to the general public, whose convenience, the legislature determined, required a street railway extending through several towns.

CARE REQUIRED IN LOOKING AND LISTENING FOR CAR —RIGHT TO RELY ON USUAL SIGNALS BEING GIVEN IN OPERATING CAR.

Stanley vs. Cedar Rapids & Marion City Railway Co. (Ia.), 93 N. W. Rep. 489. Feb. 7, 1903.

While attempting to cross a street at an intersection of streets in a buggy in which he was riding, the plaintiff was struck by a street car. The supreme court of Iowa holds that ordinary care to discover the car by looking and listening was all that was required of him under the law. He had the right to rely on the usual and ordinary signals being given by the defendant's employes in operating the car; and, while he was bound to use his senses of sight and hearing, he was not bound as a matter of law to know all that could have been discovered by the highest degree of prudence and caution.

DUTY TO PEDESTRIANS—FAILURE TO GIVE CUSTOMARY SIGNALS AND TO HAVE CAR IN CONTROL—EVIDENCE NOT LOCATING COLLISION JUST AT THE POINT ALLEGED.

Louisville Railway Co. vs. French (Ky.), 71 S. W. Rep. 486. Jan. 8, 1903. "Not to be officially reported."

The defendant (railway company), in operating dangerous machinery (trolley cars), at a high rate of speed, over the streets of a great city, the court of appeals of Kentucky holds, is bound to know that men, women, and children have an equal right to its use, and will be upon it; and it is defendant's duty to be constantly on the lookout, and to take all reasonable precautions to avoid injuring them, and this duty obtains not only at the footway crossings, but at every other point of a public street, and one of these precautions is to give notice of their approach by the customary signals, and, when necessary to avoid injury to other persons, to slow up, and, if necessary, stop their car. This duty, under the circumstances, is no more than ordinary care. If it be true that the defendant failed to give notice of their approach to the footway crossing by the customary signals, and put it out of their power to stop the car by the high rate of speed at which they were going, after they saw, or could by the exercise of ordinary care have seen, the danger of the plaintiff, they were guilty of negligence. The petition in this case proceeded upon the theory that the collision occurred upon the footway crossing, and, whilst there was testimony conducing to show that the actual collision was a short distance from the footway crossing, it was the intersection of the two streets, and this slight divergence between the averments of the petition and the testimony as to the actual point of collision was, in the court's opinion, wholly immaterial.

DUTY OF TRAVELER ON STREET TO TURN ASIDE TO LET CAR PASS—ERRONEOUS INSTRUCTION AS TO INSUFFICIENT HEADLIGHT AND CONTRIBUTORY NEGLIGENCE.

Metropolitan Street Railway Co. vs. Rouch (Kan.), 71 Pac. Rep. 257. Jan. 10, 1903.

In an action for damages for an injury occasioned by a collision between a street car and plaintiff's buggy while he was driving on or dangerously near the street car track, the supreme court of Kansas holds that an instruction to the jury to the effect that the rights of the plaintiff as a traveler upon that portion of the street occupied by the railway track and the rights of the street car company were equal, should have been qualified so as to include the duty of the traveler to turn aside to permit an approaching car to pass.

In such an action, an instruction that, even if the jury should find from the evidence that the plaintiff was negligent in having his buggy on or near the track of the defendant, so that it was struck by a car, still plaintiff would be entitled to recover if they should further find that the injury was caused entirely by the negligence of the defendant in failing to provide a headlight sufficient to enable the motorman to discover an obstruction in time to stop the car and prevent injury, and that the injury to the plaintiff would not have happened, notwithstanding the negligence of plaintiff, if such headlight had been on the car, is self-contradictory, and therefore erroneous, in that it postulates negligence in the plaintiff proximately causative of and directly contributive to the collision and injury, in the presence of which no negligent act of the defendant could be a sole or entire cause.

The instruction mentioned in paragraph 2, above, was further erroneous in that it permitted the jury to disregard negligence on the part of the plaintiff proximately causative of and directly contributive to his injury. Such negligence is sufficient to defeat recovery.

WHEN CONTRIBUTORY NEGLIGENCE NO DEFENSE TO ACTION FOR INJURY—DUTY TO PERSON IN DANGER—IMPLIED KNOWLEDGE OF DANGER—MOTORMAN SPELLBOUND WITH FRIGHT.

Barry vs. Burlington Railway & Light Co. (Ia.), 93 N. W. Rep. 68. Jan. 21, 1903.

In view of the duty which rested on the motorman of the defendants' car to be on the lookout to avoid injury to persons using the public street, the supreme court of Iowa holds that in determining whether he did see the deceased in front of his car long enough before the fatal injury was inflicted to have avoided it by the exercise of reasonable care, which, under the circumstances, would be the great care and foresight which a reasonable and competent motorman should use to avoid such an injury when the danger thereof was apparent to him, the jurors might take into account what would have been necessarily apparent to the motorman in the exercise of such care. And if, under all the circumstances, including the fact, which the evidence tended to establish, that the deceased was carried some 20 feet, while clinging to the dashboard of the car, after it came in contact with him, before he was run over, they found that the motorman did see the deceased in danger in time to have avoided the fatal injury to him, they would have been justified in returning a verdict for the plaintiff, notwithstanding the conceded negligence of the deceased in placing himself in danger.

Even in railway cases the court says that it has held that it was not necessary to show by the testimony of the employes in charge of the train that they actually saw the danger of one who was imperiled by reason of his contributory negligence, but that their knowledge of such danger could be found from circumstances indicating that they must have been aware of such danger. And in this case the finding of the jury that the motorman, who was shown to have been on the front platform of the car, from which he could easily see the surface of the street immediately in front, as he was advancing—and the fact that it was his duty, not only under the rules of the company, which were admitted in evidence, but also under the general requirement of the exercise of care in operating the car—did see the deceased in time to have avoided the fatal injury to him, would have had support in the evidence.

The court says that it is not to be understood as making any departure from the well-settled rule, recognized in the state of Iowa and by a majority of the authorities in other states, that contributory negligence will defeat recovery notwithstanding the concurrent negligence of the defendant. The effect of its holding is simply to say that, under the circumstances, the jury could have found that the motorman had knowledge of the danger of the deceased, due to his contributory negligence, in time to have avoided the fatal injury to him. If, instead of using the means within his control to stop the car after the danger to the deceased became apparent, he negligently failed to do so, or, as indicated by the testimony of one witness, became spellbound with fright, and allowed the car to run on, after seeing the danger of the deceased, without shutting off the power or reversing it, and thus an injury was inflicted which might have been avoided, then the liability of the defendant would be sufficiently shown. The controlling consideration for the court, when asked to direct a verdict for the defendant, was whether it appeared from the evidence that the motorman, in the exercise of the care required under the circumstances, was not aware of the danger in time to have avoided the fatal injury.

CARE REQUIRED FOR PROTECTION OF PASSENGERS—INJURY TO ONE BY STONE THROWN BY STRIKE SYMPATHIZER.

Fewings vs. Mendenhall (Minn.), 93 N. W. Rep. 127. Jan. 23, 1903.

A carrier of passengers, the supreme court of Minnesota holds, is charged with the highest degree of care and foresight consistent with the orderly conduct of its business, in respect to the protection of its passengers from injuries resulting from its acts or omissions, from the acts or omissions of its servants, and from the acts of strangers who are under its control or direction; but it is charged with ordinary care and prudence only to guard against the lawless acts of third persons not under its direction or control.

Defendant was engaged in operating a street car system, and his employes had inaugurated a general strike, which was bitterly contested, and resulted in much violence on the part of the lawless element among the strikers and their sympathizers. Defendant continued to operate his cars, and plaintiff was injured, when a passenger on one of them, by being struck upon the head by a stone thrown from the street into the car by a strike sympathizer, a person in no way under the control or direction of defendant. In this action to recover damages for such injury, it is held: (1) That defendant was not guilty of negligence in attempting to operate his cars during the strike; and (2) that the evidence was insufficient to justify a finding of actionable negligence against defendant as respected the act resulting in plaintiff's injury.

The rule of ordinary care and prudence is not so exacting, the court holds, as to require the person charged with its exercise to take unreasonable or extremely doubtful precautions to guard against the willful and lawless acts of strangers. The failure of defendant to pull down the blinds of the car in which plaintiff was riding, or stretch a heavy canvas over the windows outside the car, was not negligence justifying a recovery against him.

CARE REQUIRED OF ONE CROSSING TRACKS—DUTY OF LOOKING AND LISTENING AND SOMETIMES TAKING OTHER PRECAUTIONS—RULE AS TO CROSSING STEAM RAILWAY TRACKS APPLIED.

Burns vs. Metropolitan Street Railway Co. (Kan.), 71 Pac. Rep. 244. Jan. 10, 1903.

A traveler on a city street, who is about to cross the tracks of an electric street car company, the supreme court of Kansas holds, must exercise his faculties of sight and hearing, and under special circumstances must use other careful and prudent means to ascertain whether a car is approaching. In Thompson's Commentaries on the Law of Negligence (volume 2, section 1438), the court says, the learned author states that it is the general disposition of courts in their later expressions to apply the rule prevailing in respect to steam railways, and to hold that a failure of a traveler to use his faculties of sight and hearing before he attempts to cross a street railway is negligence per se (in and of itself). Street cars run many times more frequently than trains on steam railways, and are more silent in their movements. The shorter the intervals between street cars, the better the public is served. The chances of escaping injury taken by the traveler who crosses the tracks of a steam railway without looking or listening are greater by far than those of a person who in the same negligent way goes over street railway tracks in a populous city. Certainly no less vigilance ought to be exercised in the latter case than in the former. Concerning the direction to the jury that the plaintiff ought not to recover if, in addition to looking and listening, he could, by the exercise of "other careful and prudent acts," have avoided injury, no error is found in this requirement. It was asserted that the view of the plaintiff (who was riding in an express wagon and was injured in a collision while attempting to cross electric car tracks) was obstructed by two hacks standing between him and the approaching car. This fact, considering his familiarity with the operation of the cars, made it a proper matter for the jury to determine whether he ought not to have stopped and waited with his wagon, or even made inquiry of bystanders who had an unobstructed view of the approaching car.

NATURE OF CONSENTS OF ABUTTERS AND THEIR RIGHTS TO SELL SAME.

Hamilton, Glendale & Cincinnati Traction Co. vs. Parish (Ohio), 65 N. E. Rep. 1011. Nov. 18, 1902.

The consents of owners of lots abutting on a street to the construction and operation of a street railroad on such street, the supreme court of Ohio holds, are not property rights that can be appropriated under the power of eminent domain. Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot. Such personal rights were bestowed by the general assembly on owners of abutting lots as a check upon the power of municipal authorities to authorize street railroads to be constructed and operated against the wishes of the owners of lots on such street. The owners of abutting lots are free to give or withhold such consent, upon such terms as to them severally may seem proper, and there is no public policy in the state of Ohio against giving such consent for a valuable consideration moving from the street railroad company to such lot owner.

INJURY TO CONDUCTOR BY ANOTHER CAR WHILE TRYING TO OPEN GATE AFTER CHANGING TROLLEY AT CROSS-OVER—SUFFICIENT LOOKING FOR CAR—MOTORMAN SEEING PERSON NEAR TRACK OR IN PLACE OF DANGER—STREET RAILWAYS INCLUDED IN "RAILROAD" FELLOW-SERVANTS ACT.

Stocks vs. St. Louis Transit Co. (Mo. App.), 71 S. W. Rep. 730. Jan. 20, 1903.

When the conductor on a new, inclosed vestibule car which had become disabled had changed the trolley and given the signal to the motorman to go ahead, at a cross-over, to take the car into the sheds, he undertook to board the car, but found difficulty in opening the gate, and, while trying to do it, was struck by an east-bound car that came up on the inside track. The jury were instructed, in effect, that if, after the conductor had changed the trolley, he looked west, and saw no approaching car, and immediately gave the signal to the motorman to go ahead, and attempted to get on the car through the gate to the vestibule, he was not guilty of negligence in failing to continue to look and listen for an approaching car; and the court of appeals at St. Louis, Mo., thinks this was so. It says that the situation of the conductor was like that of a footman about to pass over a crossing of a street on which there are street railway tracks, who, having the opportunity to see, looks, and sees no car. He would then have a right to assume that he might cross in safety, and if, in attempting to cross, by the negligence of a motorman in charge of a car, he should be struck and injured, it could not be asserted successfully that he was guilty of contributory negligence. The conductor was in the performance of the duties incident to his employment. He had changed his trolley, and was trying to board the car through the only means of ingress to the rear platform. According to his uncontradicted testimony, before attempting to board the car he had looked in the direction from which the car came that struck him, and saw no car approaching, and immediately, while his attention was absorbed in directing the movement of his own car and in his effort to board it, he was struck and injured. Negligence could not be inferred from such conduct.

Then, the court holds that, if one is seen near by and approaching a railway track by the engineer or motorman in charge of a train or car, but not in a place of danger, and a warning signal is given, the engineer or motorman has a right to assume (unless it appears that the warning is unheeded) that the person will not, in disregard of the instincts of self-preservation, deliberately place himself on the track, or in a place of danger, and is not required to stop or check his train or car for fear the man may act extraordinarily, and contrary to sanity, by putting himself in a place of known danger. But no such assumption can be indulged where the plaintiff, when discovered by the motorman or engineer, is standing in a place of peril, and when it is apparent, if he does not move out of it, he will be struck and injured unless the car or train is checked or stopped. In such circumstances the engineer or motorman has no right to assume that the person will move out of the place of danger in time to avoid injury. His duty is to assume, if he does not move when the signal is given, that he may not do so, and to use his best endeavor to stop or check his car in time to avoid injury.

When the word "railroad" is used in a statute, there is no definite rule of construction, the court holds, as to whether it includes street railways. It may or it may not include them. The meaning of a word must depend on the context and the general intent of the statute in which it is used. And the court holds that corporations owning and operating street railways are included in section 2873 of the Revised Statutes of Missouri, which provides: "That every railroad corporation, owning or operating a railroad in this state, shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof; provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury."

DUTY OF TEAMSTER TO LOOK AND LISTEN FOR CAR UNTIL PAST FURTHER TRACK—INSTRUCTION OF JURY.

Sanitary Dairy Co. vs. St. Louis Transit Co. (Mo. App.), 71 S. W. Rep. 726. Jan. 20, 1903.

It is the law here and elsewhere, says the court of appeals at St. Louis, Mo., that it was the duty of the plaintiff's driver, before he attempted to drive across the street, to look and listen, according to his opportunity, for an approaching car on the south track, and that his duty was continuing until he passed the track. And if the car on the northwest corner obstructed his view when he first got on the street, after passing that obstruction it was his duty then to look for an approaching car before driving on the south track. The law has established specifically what is "ordinary care" in a traveler approaching a railway crossing before attempting to pass over it, and it is the duty of trial courts, whenever the question is to be submitted to a jury, to define in the terms the law has laid down what constitutes ordinary care, and not leave it to the jury to draw their own conclusions as to what ordinary care is in such circumstances.

LEGISLATIVE AUTHORITY REQUIRED—ELECTRIC ROAD NOT AN ADDITIONAL SERVITUDE—CHANGING SYSTEM WHEN FIRST AUTHORIZED BY PRIVATE CONTRACT ONLY.

Humphreys vs. Ft. Smith Traction, Light & Power Co. (Ark.), 71 S. W. Rep. 662. Jan. 10, 1903.

The supreme court of Arkansas holds that, while the county court has general jurisdiction of all matters pertaining to the public roads of the county, yet the public roads referred to are the common highways of the county, constructed for the convenience of the public as a way for the passage of pedestrians, horsemen, animals, and private vehicles, etc., and that, without legislative grant, the county court cannot add to or enlarge the servitude on public highways, to the extent of granting permission to private persons or corporations to construct and operate street railways over the public highways of the county.

Again, the court hold that if, in this case, the grant of the right of way to the horse-car system had been by one having authority, and not a mere permission and waiver of claim for damages by abutting owners, the change from a horse car to an electric system, with the necessary changes of appliances, would not amount to an additional servitude, but only to an improvement, which is allowable, and without further express grant. But in this case the plaintiff was bound only by her contract, and any change in the location of the track which was essentially different from that in view of which they contracted, and which worked an injury to her property or business, created a liability in her favor and against the company. Likewise the erection of poles and wires.

STARTING OF CAR ON SIGNAL OF STRANGER WHILE PASSENGER IS ALIGHTING—ABSENCE OF CARE AND FORESIGHT NECESSARY TO LIABILITY —NO LIABILITY FOR ACTS OF STRANGERS.

Krone vs. Southwest Missouri Electric Railway Co. (Mo. App.), 71 S. W. Rep. 712. Jan. 5, 1903. Rehearing denied Feb. 2, 1903.

It was requested that the jury be instructed that if they believed from the evidence that the conductor stopped the car at a certain street to let the plaintiff and another woman get off, and that the other woman got off, and, before the plaintiff could get off, some one, not an employe of the defendant, without the knowledge or authority of the conductor, rung the bell, and gave the motorman the signal to start, and in pursuance of said signal the motorman started the car, and the plaintiff fell off, then there was no negligence on the part of the defendant, and the plaintiff could not recover in this case, and their finding would be for the defendant. The court of appeals at Kansas City, Mo., says it cannot see upon what theory this instruction was refused, for if it was true that some person other than the conductor, and not in the defendant's employ, gave the signal which started the car while the plaintiff was attempting to get off, causing her fall and injury, it was not the result of any negligence on the part of the defendant, but that of a careless or mischievous stranger, over whom the defendant had no control. There must be absence of care and foresight in order to make the carrier liable for an injury to a passenger. Railroads are not to be held liable for injuries caused solely by the acts of persons who do not hold to them any relation of express or implied agency.

CONTRIBUTORY NEGLIGENCE A DEFENSE WHERE INJURY IS CAUSED BY ONE CONTINUOUS ACT OF NEGLIGENCE AS BY DRIVER NOT LOOKING FORWARD AT ALL.

Bortz vs. Dry Dock, East Broadway & Battery Railroad Co. (N. Y. Sup.), 79 N. Y. Supp. 1046. Jan. 23, 1903.

The proximate cause of an injury being one continuous act of negligence in careless driving by the driver of a horse car who had his head averted and evidently was not aware of any one being on or near the track until the accident occurred, the first appellate division of the supreme court of New York holds that it was error to modify a requested instruction on contributory negligence by charging the jury, in effect, that, if they found the facts to be as stated in the request, the contributory negligence thereby established would not prevent a recovery, if by the exercise of reasonable car and prudence the accident could have been avoided, thus eliminating from the case the whole subject of contributory negligence, for the reason that the jury would be entitled to find that the car was not operated by the driver with reasonable care and prudence. The court considers the case entirely unlike those in which a new element is introduced to show that, notwithstanding contributory negligence, by the exercise of reasonable care and prudence of a defendant or its servants the accident could have been avoided.

CARE REQUIRED IN OPERATING STREET RAILWAY—DUTY OF MOTORMAN TO BE ON LOOKOUT—DUTY TO INFANT SEEN ON OR APPROACHING TRACK—SOUNDING OF GONG NO DEFENSE—DUTY TO SEE THAT TRACK IS CLEAR—PRESUMPTION AS TO ADULT APPROACHING TRACK.

San Antonio Traction Co. vs. Court (Tex. Civ. App.), 71 S. W. Rep. 777. Jan. 7, 1903. Motion for rehearing overruled Feb. 4, 1903.

Among the appliances of modern civilization, the court of civil appeals of Texas says, there is none perhaps that is attended with more constant danger to life and limb than the operation of street surface railroads in cities and towns by means of electricity. Operating, as they do, in the busiest and most frequented localities, propelled by a subtle and powerful agency, at a higher rate of speed than other vehicles allowed upon streets and thoroughfares, it has been found necessary to require of their operators a high degree of care and caution in their conduct towards pedestrians and those using other and different kinds of vehicles. Having in view the danger to human life in the operation of such cars, it is uniformly held that it is the duty of the motorman in crowded city streets to be on the lookout, and to employ all reasonable means to avoid accidents, and to recognize and respect the equal rights of others in the use of the streets.

The requirement of care, as above stated, applies to all adults or infants; but in the case of the latter of tender years, who have not reached the years of discretion, a higher degree of care is demanded when discovered in a position of probable danger. The same degree of care towards such an infant as would be required towards an adult would not be a defense to a charge of negligence, but would, as has been said, amount to what is termed "gross negligence." The employe of the carrier can, when he sees an adult approaching its track, usually indulge in the presumption that he is sane and will not place himself in a position of danger; but not so in the case of a child, who has not reached the years of discretion. No presumption can be indulged in in regard to such a child, but the carrier must govern its actions with a view to the unreasoning conduct usually evinced by that class of persons.

When a young child is discovered approaching the tracks with the apparent intention of crossing it in front of a moving car, or if it be discovered upon the track, the sounding of gongs or ringing of bells would be no ground of defense, because to the child without discretion they would be meaningless, and nothing short of the greatest effort to stop the car and avert the danger would free the street car company from negligence.

It is the duty of street surface railway companies in cities and towns to keep a careful lookout for persons or vehicles, not only on the track, but those appearing likely to enter upon the track in proximity to the cars. Street railways have the same right on the streets as the general public has, and no greater, and they must act with a view to the right of the public, and the duty rests upon them to see that their tracks are clear.

In this case, a child walked from the direction the car was coming, obliquely on the track, about 12 feet ahead of the car. The court says that if the child was seen, or could have been seen by the exercise of care, approaching the track with the apparent intention of getting on the track, or if it was seen or should have been seen on the track and every care was not used to prevent the injury, the company was liable. If the child was seen before or after getting on the track the street railway company would be held to a higher degree of care than in the case of an adult; for, while there was no proof as to the discretion of the child, it will be held, as a matter of law, that an infant of four years of age is lacking in that discretion which would warn it of the dangerous position occupied by it.

Under the facts in this case, the motorman must have seen the child approaching the track, and when it got on the track, with the car running at the slow speed it was, it was clear that by the use of ordinary care the car could have been stopped and the injury averted. If the motorman was engaged in conversation, or was looking to the sidewalks and away from the car track, and did not see the child approaching or on the track, he was derelict in his duty, and guilty of negligence which would be imputed to his master, and render it liable for the injuries inflicted upon the child.

REFUSAL TO STOP TO TAKE ON PASSENGER—NO DUTY TO PREVENT PEOPLE BOARDING CAR CROSSING RAILROAD TRACKS—BOARDING MOVING CAR —SIGNAL UNNECESSARY WHEN INTENTION KNOWN—INTOXICATION OF PERSON INJURED ATTEMPTING TO BOARD CAR.

South Chicago City Railway Co. vs. Dufresne (Ill.), 65 N. E. Rep. 1075. Dec. 16, 1902. Rehearing denied Feb. 4, 1903.

An allegation that the defendant (railway company) did not stop the car after the plaintiff had given notice of his intention to take passage, in consequence of which, while he was attempting to take passage, he was thrown to the ground, the supreme court of Illinois holds, did not state a cause of action for the plaintiff's injury. If a refusal to stop cars on notice would give rise to a cause of action, it would necessarily be for damages resulting from the refusal to stop, which might consist of delay or loss of time, but the refusal to stop and accept him as a passenger would not be the proximate cause of the injury alleged.

The place where the accident occurred was where three sets of steam railroad tracks had to be crossed. The street cars were compelled to stop, and the conductor to go forward and see if the way was clear, in the case of each set of railway tracks, and upon signals the cars would pass over such tracks. In this process they ran so slowly that persons could get on them if they saw fit, so far as the speed of the cars was concerned. The court says that it was not the business of the motorman to keep them off, nor the duty of the conductor. To hold that the defendant must prevent people from committing acts of negligence by getting on cars in motion at other than the stopping places would be to make it a guardian and protector of the public, and responsible for a failure to prevent acts of negligence. The mere fact that the negligent, heedless, or reckless should choose to get on the cars without due regard for their own safety would not change the responsibility of the defendant. It could only be held responsible for its own act of negligence, and to hold that it must prevent negligent acts in others, or assume the same responsibility as it would at a regular stopping place, would be equivalent to abolishing contributory negligence altogether. It was different from a case where a company, by the action of its conductors, encouraged the practice of boarding moving trains at a certain place, and it was held that it became its duty to run the trains in reference to the practice which it recognized and aided. The defendant being compelled to pass over these systems of tracks in the manner it did, there could be no inference that the speed was reduced to enable passengers to get on. If getting on the cars while crossing the tracks of the steam railroads was negligence, it would, of course, make no difference how many persons were guilty of such acts of negligence.

It is not negligence, as a matter of law, for a passenger to get on a street car when it is in motion; but the question is one of fact, depending upon the rate of speed of the car and all the circumstances.

Evidence that a large number of people approached the cars and got on, with the knowledge of the motorman and conductor, was uncontradicted. Plaintiff was the last one to get on, and the motorman and conductor had notice of his intention to board the car. Under these circumstances, the court holds, it was not necessary for him to signal the motorman or conductor to manifest his desire, and it was not error to give an instruction to the effect that if the plaintiff did not signal the motorman or conductor, and the motorman did not slacken the speed of the cars or bring them to a stop for the purpose of inviting the plaintiff to get on, the verdict must be for the defendant.

If the plaintiff, by intoxication, exposed himself to danger, and received his injuries for the want of such care as a reasonably prudent person would have exercised if sober, he would be guilty of contributory negligence. Mere intoxication will not relieve a person from the responsibility of avoiding danger in attempting to get on a street car, to the same extent as if he had been sober. The rule is that voluntary intoxication will not excuse a person from such care as may reasonably be expected from one who is sober.

POWER OF CITY TO REQUIRE IMPROVED PAVEMENT BETWEEN TRACKS TO CONFORM TO CHANGE IN GRADE—COST TO CITY AS EVIDENCE OF AMOUNT RECOVERABLE.

City of Reading v. United Traction Co. (Pa.), 52 Atl. Rep. 106. May 19, 1902.

Where a street railway company has with its tracks occupied streets of a city with its consent, and on condition (a) that it pave its right of way and keep the same in good repair, or (b) that it pave said right of way in a specified manner, superior to the then construction of the street, and keep said paving in good repair, the city, the supreme court of Pennsylvania holds, can, upon adoption, and upon notice to the company of the adoption, of an improved pavement for the rest of the street, with which the original pavement of the right of way is incongruous and practically incompatible, require the company, the pavement upon its right of way being in fact out of repair, to replace the same with a pavement reasonably corresponding with the street pavement adopted. It also holds that the city may recover for depressing the company's tracks to conform to a change in the grade of the street, where the company operates under a charter which provides that the city council shall have the power to establish such regulations in regard to the railway as may be required for the purpose of paving, repairing and grading in and along the streets used by the company, and to prevent obstructions thereon. And it holds that where a city has done work upon a street railway company's right of way, which the company was bound, but neglected, to do, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is prima facie the amount which it is entitled to recover.

ERRATA.

Page 30, line 17: Read "day by day" instead of "dry by day."

Page 101, line 2: Read "continue" instead of "contribute."

Page 126, line 6 from bottom: Read "some" instead of "same."

Page 180, heading: Read "of step" instead of "or step."

Page 204, second heading: Read "fault" instead of "default."

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